Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

CITY OF SEATTLE,

Petitioner,

v.

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court for the State Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, Seattle police officers arrested adult entertainers after observing violations of the standards of conduct set forth in Seattle's adult entertainment ordinance, including self-massage and simulated masturbation.

1. When a police officer is deciding to make an arrest for criminal conduct, are all acts by an adult entertainer on stage presumptively considered expressive conduct protected by the First Amendment?

1(A). Does such presumptive protection extend to protect conduct by an adult entertainer even when she denies engaging in expressive conduct?

2. When a police officer is deciding whether to make an arrest under a city ordinance which regulates both conduct and obscene expression, must the officer have probable cause to believe that the observed conduct is obscene in order to make a lawful arrest under the Fourth Amendment?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to this proceeding: the City of Seattle, Washington, as Petitioner, and as the municipality whose police officers made arrests at Rick's adult nightclub in Seattle; Respondents Brandy Kidder and Esmeralda Silva, as adult entertainers arrested by Seattle Police officers at Rick's nightclub; Respondent Nick Furfaro, as manager of Rick's nightclub arrested by Seattle Police officers; and JJR Inc., a Washington corporation, as owner of Rick's nightclub.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CITED AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

A. Factual Background 7

1. Seattle police officers arrested the individual plaintiffs 7

2. The City obtained partial summary judgment prior to trial 9

3. The City prevailed at trial 9

B. The Court of Appeals Imposed a Warrant Requirement and Remanded Plaintiffs' Wrongful Arrest Claims for Retrial 11

C. The Washington Supreme Court Held that the Conduct of the Entertainers Was Expression *Per Se* 12

REASONS FOR GRANTING THE WRIT 13

A. Review is warranted because the Washington Supreme Court has wrongly extended significant First Amendment protection to non-expressive conduct by adult entertainers, in contravention of this Court's prior decisions 13

1. The Washington Supreme Court's decision conflicts with *Texas v. Johnson* 14

2. The Washington court's decision is in conflict with other cases from this Court 15

3. The Washington Supreme Court misapplied *Pap's A.M.* and ignored *Paris Adult Theatre I* 16

B. Review is warranted because this Court should resolve the important federal question regarding the level of First Amendment protections for adult entertainers subject to arrest for violating conduct ordinances 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

Cases

Amendment IV to the Constitution of the United States 2, 7, 22

Amendment XIV to the Constitution of the United States 2, 3, 9, 16

Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) 19

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) 16, 20, 22

City of Erie v. Pap's A.M., 529 U.S. 277 (2000)..... 2, 4, 5, 6, 12, 13, 16, 17, 18, 19, 20

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 16

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 22

Texas v. Johnson, 491 U.S. 397 (1989) 5, 14, 15

United States v. O'Brien, 391 U.S. 367 (1968) 16

Statutes

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 ..... 2, 3, 9

Other Authorities

Amendment IV to the Constitution of the United States 2, 7, 22

Amendment XIV to the Constitution of the United States 2, 3, 9, 16

Seattle Municipal Code 6.27.100 7

APPENDIX

Page

Furfaro v. Seattle, 144 Wn.2d 363 (2001) ..... App. 1

Furfaro v. Seattle, 97 Wn. App. 537 (1999) ..... App. 28

Furfaro v. Seattle, 36 P.3d 1005 (2001) ..... App. 46

Rep. Tr., Dec. 9, 1997, pp. 13-16
(Witness Furfaro) ..... App. 50

Rep. Tr., Dec. 9, 1997, pp. 64-67
(Witness Kidder) ..... App. 56

Rep. Tr., Dec. 9, 1997, pp. 105-106
(Witness Kidder) ..... App. 61

Rep. Tr., Dec. 10, 1997, p. 29
(Witness Silva) ..... App. 65

Rep. Tr., Dec. 11, 1997, pp. 1-3
(Witness Swanson) ..... App. 68

Rep. Tr., Dec. 11, 1997, pp. 10-20
(Witness Swanson) ..... App. 72

Transcript of Detective Swanson's
recorded observations ..... App. 84

PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Seattle respectfully prays that a writ of certiorari be issued in this case. Seattle's adult entertainment ordinance regulates conduct, such as simulated masturbation and self-massage, as well as obscene expression. While this Court's decisions have afforded minimal protection to nude dancing, arresting officers have never before been forced to view all acts by an adult entertainer as *per se* expressive conduct. Nonetheless, in purported reliance upon this Court's decisions, the Washington Supreme Court has extended presumptive First Amendment protections to all acts committed by adult entertainers. In the absence of controlling authority from this Court, the Washington Supreme Court has also imposed a new Fourth Amendment requirement for all arrests of adult entertainers under Seattle's adult entertainment ordinance: the consideration of obscenity. This Court should issue a writ of certiorari to resolve these important Constitutional issues.

OPINIONS BELOW

The Washington Supreme Court's December 5, 2001 order granting reconsideration and changing opinion (App., *infra,* 46-48) is reported at 36 P.3d 1005. The Washington Supreme Court's August 2, 2001 decision reversing and remanding to the Washington Court of Appeals (App., *infra,* 1- 27) is reported at 144 Wn.2d 363, 27 P.3d 1160. The Washington Court of Appeals' decision of September 27, 1999 reversing the trial court (App., *infra,* 28-45) is reported at 97 Wn. App. 537, 984 P.2d 1055.

JURISDICTION

The Washington Supreme Court's order granting reconsideration was filed December 5, 2001. App., *infra*, 46-48. The Washington Supreme Court's order extending First Amendment protections and interpreting *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), was filed August 2, 2001. App., *infra*, 1-27.

This petition is filed under this Court's Rule 10(c). Jurisdiction is vested in this Court by 28 U.S.C. § 1257(a), as the validity of the arrests of Silva, Kidder, and Furfaro are challenged under 42 U.S.C. § 1983, and the First, Fourth and Fourteenth Amendments of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech ...." U.S. Constitution, Amendment I.

The Fourth Amendment to the Constitution of the United States provides, in pertinent part, that "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation ...." U.S. Constitution, Amendment IV.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...." U.S. Constitution, Amendment XIV.

42 U.S.C. § 1983 provides, in pertinent part, that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State ... subjects or causes to be subject, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1979).

Seattle Municipal Code 6.270.100 provides, in relevant part:

> A. The following standards of conduct must be adhered to by employees of any adult entertainment premises:
>
> * * *
>
> 2. No employee or entertainer shall perform acts of or acts which simulate:
>
> a. Sexual intercourse, masturbation . . .;
>
> b. The touching, caressing or fondling of the breasts, buttocks or genitals;

* * *

C. This chapter shall not be construed to prohibit protected expression . . . .

App., *infra*, 14-15 (144 Wn.2d at 376-377).

STATEMENT OF THE CASE

This petition seeks to remedy the Washington Supreme Court's erroneous and unwarranted grant of significant new Constitutional protections to adult entertainers. This Court's prior decisions have supported the States' ability to regulate nude dancing as conduct on the very outer fringe of First Amendment protection[1]. Regulation is essential, as nude dancing is often accompanied by increased levels of deleterious effects and criminal conduct, such as prostitution, rape, and drug trafficking[2]. While this Court has previously recognized that adult entertainment ordinances might have an incidental effect upon some expression, the Washington Supreme Court has taken the unprecedented steps of finding that all acts by an adult entertainer are *per se* expressive conduct protected by the First Amendment, and therefore subject to arrest only if obscene.

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[1] *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) ("As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think it falls only within the outer ambit of the First Amendment's protection.").

[2] *Id.* at 296 ("The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important.").

Supreme Court Rule 10 provides that a petition for a writ of certiorari may be granted for compelling reasons. Such reasons include a state court having decided an important federal question (1) in a way that conflicts with relevant decisions of this Court, or (2) that should be settled by this Court. In this case, both reasons are present.

First, the Washington Supreme Court decided that all conduct on stage by an adult entertainer is presumptively expressive conduct protected by the First Amendment. In doing so, the Washington Supreme Court interpreted this Court's decision in *City of Erie v. Pap's A.M.* as having "stated clearly, for perhaps the first time, that nude dancing is expressive conduct."[3] In fact, the Washington Supreme Court reads *Pap's A.M.* as holding that all conceivable acts of an adult entertainer, including table dances, lap dances, and stage dances, are expressive conduct protected by the First Amendment.[4] However, the Washington Supreme Court's decision is contrary to this Court's two-part test for determining whether conduct is "expressive," as set forth in *Texas v. Johnson*.[5] In

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[3] App., *infra*, 17 (144 Wn.2d at 378).

[4] App., *infra*, 18 (*Id.* at 378-379) (additional citation omitted) (holding that the Supreme Court "sees no relevant legal difference between the kind of nude dancing at issue in *Pap's A.M.* and that in *Barnes* and *Schad*. Hence, nude dancing of various sorts, is, according to the Court, expressive conduct. Moreover, according to Justice Scalia, the kind of nude dancing at issue in *Pap's A.M.* was lap dancing. After *Pap's A.M.*, nude dancing is afforded the protection due to expressive conduct.")

[5] 491 U.S. 397, 409 (1989) (holding that an action is expressive within the scope of the First Amendment if an "intent to convey a

addition, the Washington court actually misapplied *Pap's A.M.* Pursuant to the controlling precedent from this Court, adult entertainers are not entitled to a legal presumption that all of their actions are protected by the First Amendment at the time of arrest. This Court should grant the petition to correct this error.

Second, in setting the level of Constitutional protection for adult entertainers, the Washington Supreme Court now requires that an arresting officer have probable cause to believe that any conduct he was observing was obscene. In doing so, the Washington courts below acknowledged that this Court has not yet clarified the level of Constitutional protection to be afforded to adult entertainers subject to a lawful arrest[6]. At most, this Court has clarified that the marginal expression of adult entertainers should be afforded some marginal level of protection[7], but police officers making arrests for criminal conduct need additional

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particularized message was present and the likelihood was great that the message would be understood by those who view it.")

[6] App., *infra,* 9 (144 Wn.2d at 371) ("... the Court of Appeals once again concedes that authority for its position is scant: 'Neither the United States Supreme Court nor any Washington court has decided whether warrantless arrests of nude dancers in an adult nightclub are a prior restraint.'")

[7] *See, e.g., Barnes,* 501 U.S. 560, 565-566 (1991) (Nude dancing "is expressive conduct within the outer perimeters of the First Amendment, although ... only marginally so."); *California v. LaRue,* 409 U.S. 109, 117 (1972) ("But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action.'")

clarification regarding the actual level of protection provided by the First Amendment and the Fourth Amendment. This important question of federal law should be considered and decided by this Court.

In summary, the Washington Supreme Court's decision in *Furfaro* has extended significant new federal Constitutional protections to the activities of adult entertainers. First, activities by adult entertainers are now presumed to be expressive conduct, without regard to the actual intent of the actors. Second, entertainers are now subject to lawful arrest only where the arresting officer has probable cause to believe that the conduct he has witnessed is obscene. This obviously leaves no allowance for the possibility that the arresting officer might have reason to believe that he has witnessed pure criminal conduct. Given the important governmental interest in regulating the non-speech elements of nude dancing, this Court should grant a writ of certiorari and resolve these Constitutional questions.

A. Factual Background.

1. Seattle police officers arrested the individual plaintiffs.

Undercover Seattle Police detectives entered Rick's nightclub on November 20, 1995, to look for conduct violations of Seattle's adult entertainment ordinance, SMC 6.27.100. One detective made a tape recording of observed conduct violations, and he verbally described the actions of entertainers on the main stage. App., *infra*, 3 (144 Wn.2d at 366-67).

The taped observations included the detective's observations of "Gabrielle," the stage name used by Brandy Kidder. App., *infra,* 68-70 (Rep. Tr., Dec. 11, 1997, at 2-3). The tape also included observations of "Essie," whom Swanson later learned was Esmeralda Silva. App., *infra,* 70 (*Id.* at 3). The detective recorded the following observations for Kidder and Silva:

> Gabrielle on the main stage black sparkling string bikini. She touched her anus, buttocks, massaged her breasts. Gabrielle has long brown hair, slightly on the heavy side.
>
> * * *
>
> Jessie on the main stage. A Hispanic female, long black hair wearing a black lace bra and a matching black lace t-bar and white stiletto heels. Jessie is massaging her breasts and massaging her vagina. Again massaging her breasts, pinching her nipples; she just massaged her vagina, again massaging her breasts, pinching her nipples. She again massaged her vagina.
>
> * * *
>
> I think we've come around full circle. Gabrielle is back up on stage. She just touched her vagina again, rubbing her breasts, and (unintelligible).

App., *infra,* 84-85, 87 (Tr. Ex. 5, Swanson tape transcript at 1-2; 4).

Based on the recorded observations, officers arrested 13 dancers, including Silva and Kidder, as well as their manager, plaintiff Nick Furfaro. App., *infra,* 3 (144 Wn.2d at 367). Silva, Kidder and Furfaro subsequently challenged their arrests under 42 U.S.C. § 1983, alleging a violation of the First, Fourth, and Fourteenth Amendments, as well as additional claims. App., *infra,* 3-4 (*Id.*).

2. The City obtained partial summary judgment prior to trial.

At summary judgment, the trial court dismissed all state tort claims, and dismissed on qualified immunity grounds all 42 U.S.C. § 1983 claims against individual defendants. However, the trial court preserved § 1983 claims against the City for trial. App., *infra,* 3-4 (144 Wn.2d at 367).

3. The City prevailed at trial.

At trial, Brandy Kidder denied committing the criminal acts reported by the detective, and testified that she did not masturbate during her stage appearance. App., *infra,* 57-58 (Rep. Tr., Dec. 9, 1997, at 64-65). Kidder testified that her hands didn't remain in any one area (App., *infra,* 56 (*Id.* at 64)), and that she "didn't do any dirty dances that day." App., *infra,* 59 (*Id.* at 67). Finally, she testified that she never thought any of her actions could be considered masturbation or simulated masturbation. App., *infra,* 61-62 (*Id.* at 105-06).

Esmeralda Silva likewise denied committing the acts observed by the detective, and testified that she never massaged her vagina or rubbed her vaginal area during her stage appearances on November 20. App., *infra,* 65 (Rep. Tr., Dec. 10, 1997, at 29). Instead, she testified that she merely covered herself with her hands. *Id.* Neither Kidder nor Silva admitted at trial to massaging breasts or rubbing vaginas in the manner described by Detective Swanson, nor did either testify that she intended to convey any message by massaging her breasts or rubbing her vagina on November 20.

At trial, officers testified that they had observed conduct violating the ordinance's prohibition on touching, caressing, or fondling of the breasts, buttocks, or genitals. Detective Swanson confirmed that he had observed the violations by Kidder and Silva as recorded on the tape. App., *infra,* 82-83 (Rep. Tr., Dec. 11, 1997, at 19-20). None of the touches were momentary or fleeting touches. *Id.* According to the detective, "massaging a breast" means grabbing the breast and squeezing, manipulating it with the hand. App., *infra,* 75 (*Id.* at 12-13). "Massaging the vagina" means actual touching of the vaginal area with the hand and fingers for two to three seconds. App., *infra,* 78-79 (*Id.* at 16). Detective Swanson did not record incidental contact or incidental touching as a violation. App., *infra,* 80-81 (*Id.* at 18).

Kidder and Silva played a videotape to the jury purporting to show the type of dances performed by Kidder and Silva. However, the detective testified that the videotape omitted the specific conduct violations

that he had observed during the performances by Kidder and Silva. App., *infra,* 20-21 (144 Wn.2d at 380).

During its deliberations, the jury was instructed by the trial court as follows: "In determining probable cause, an arresting officer making an arrest for expression, must consider obscenity. In determining probable cause, an arresting officer making an arrest for conduct, need not consider obscenity." App., *infra,* 22-23 (*Id.* at 382-383). There was absolutely no evidence at trial that any officer considered obscenity or made an arrest for expression. App., *infra,* 19 (*Id.* at 378). Instead, the officers testified that they observed and arrested for conduct violations of Seattle's ordinance. App., *infra,* 17 (*Id.* at 377-378). The jury found that the arresting officers had probable cause to arrest Furfaro, Kidder, and Silva. App., *infra,* 29 (97 Wn. App at 540).

B. The Court of Appeals Imposed a Warrant Requirement and Remanded Plaintiffs' Wrongful Arrest Claims for Retrial.

On appeal, Washington's Court of Appeals found that the activities described by the arresting officers were "nude dance performances" (App., *infra,* 28 (*Id.* at 539)), and therefore "presumptively protected by the First Amendment." App., *infra,* 33 (*Id.* at 543). The Court of Appeals ruled that a warrant was required prior to making arrests under Seattle's ordinance, and remanded the case for additional proceedings. App., *infra,* 43 (*Id.* at 551).

C. The Washington Supreme Court Held that the Conduct of the Entertainers Was Expression *Per Se.*

The Washington Supreme Court reversed the Court of Appeals' requirement that officers obtain a warrant from a magistrate prior to effecting arrests under Seattle's adult entertainment ordinance. App., *infra,* 25 (144 Wn.2d at 384). However, the Washington Supreme Court did hold that all acts by adult entertainers are expressive conduct, interpreting *City of Erie v. Pap's A.M.* as having "stated clearly, for perhaps the first time, that nude dancing is expressive conduct."[8] The Washington Supreme Court then found that probable cause for the arrest of such entertainers must include a determination of obscenity. App., *infra,* 21-22 (*Id.* at 381-382). Thus, the case was remanded for trial on the question of whether the arresting officers had probable cause to believe that the observed acts were obscene. App., *infra,* 23 (*Id.* at 383).

Silva and Kidder moved for reconsideration on matters irrelevant to this petition. The Washington Supreme Court granted reconsideration in part by order dated December 5, 2001. App., *infra,* 46-48. This timely petition for a writ of certiorari followed.

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[8] App., *infra,* 17 (144 Wn.2d at 278).

REASONS FOR GRANTING THE WRIT

A. Review is warranted because the Washington Supreme Court has wrongly extended significant First Amendment protection to non-expressive conduct by adult entertainers, in contravention of this Court's prior decisions.

A petition for a writ of certiorari will be granted only for compelling reasons. When a state court decides an important question of federal law in conflict with relevant decisions of this Court, a compelling reason under Supreme Court Rule 10 is established. From the numerous prior Supreme Court opinions addressing the interplay between the First Amendment and nude dancing, it is apparent that important questions of federal law are implicated by the *Furfaro* decision[9].

In this case, the Washington Supreme Court acknowledged that this Court has granted nude dancing only minimal protection under the First Amendment. App., *infra*, 12 (144 Wn.2d at 374). However, the Washington Supreme Court's decision extends significant new presumptive First Amendment protection, automatically covering all actions by adult entertainers. As a result, sex acts, even those committed with absolutely no communicative intent, would now be automatically protected as First Amendment expression. Ironically, Silva and Kidder failed to establish any communicative element to their criminal

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[9] *See, e.g., Pap's A.M.*, 529 U.S. 287 (certiorari was granted to review Constitutional challenge to Erie's public nudity statute).

acts, yet they would be the first people to benefit from the new presumptive protections. The Washington Supreme Court's decision is in conflict with several controlling opinions from this Court.

1. The Washington Supreme Court's decision conflicts with *Texas v. Johnson*.

The Washington Supreme Court's decision granting presumptive First Amendment protection to all sex acts by an adult entertainer is contrary to this Court's holding in *Texas v. Johnson,* 491 U.S. 397 (1989). In *Johnson,* the Court applied a two-part test for deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play: "whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." 491 U.S. at 404 (additional citation omitted). In applying the test to defendant Johnson's act of burning an American flag, the Court noted that "We have not automatically concluded, however, that any action taken with respect to our flag is expressive." *Id.* at 405. While the *Johnson* decision ultimately concluded that the defendant's action was conduct "sufficiently imbued with elements of communication . . . to implicate the First Amendment," *Id.* at 406, it specifically rejected the type of wholesale presumptive protection afforded to Kidder and Silva by the Washington Supreme Court in this case.

It is apparent from the Court's opinion in *Johnson* that the First Amendment should not automatically extend to particular forms of activity. The Court rejected such protection for all physical conduct with respect to the flag, easily conjuring up a hypothetical where a tired person might drag the flag through the mud, "knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea." *Id.* at 403, fn. 3. The Court concluded that the prosecution of such a person "would pose a different case" than the flag burning activities of defendant Johnson, which Johnson contended were meant to be a political statement of protest. *Id.*

In this case, Kidder and Silva cannot satisfy the first prong of *Johnson's* test. Rather than testifying that they massaged themselves to send a message, Kidder and Silva contested their arrests by denying that they committed such acts. The Washington court's decision is contrary to the requirements of *Johnson*.

2. <u>The Washington court's decision is in conflict with other cases from this Court</u>.

There is no precedent for presuming during an arrest that all acts by adult entertainers are expressive conduct. Instead, this Court has specifically refused to grant presumptive First Amendment protection to conduct by adult entertainers. Addressing a challenge by topless dancing businesses to North Hempstead, New York's ordinance, this Court noted that "Although the customary barroom" type of nude dancing may involve only the barest minimum of protected

expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (emphasis supplied)[10]. Given that protection is only appropriate under some circumstances, there must be other circumstances where there is no entitlement to such protection. The *Furfaro* decision fails to allow for such circumstances in conflict with this Court.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569-570 (1991), this Court reiterated *O'Brien's* rejection of expansive notions of "expressive conduct," emphasizing that "[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Barnes*, 501 U.S. at 570 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Significantly, when the person engaged in the conduct offers no evidence that she intended to express any idea thereby, the label of speech is even more misplaced.

3. The Washington Supreme Court misapplied *Pap's A.M.* and ignored *Paris Adult Theatre I*.

The Washington Supreme Court acknowledged that prior opinions of this Court afforded only minimal

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[10] The challengers in *Doran* were permitted to demonstrate potential infringements to other actors, but only because they brought an overbreadth challenge to the statute. 422 U.S. at 933. In contrast, Kidder and Silva here challenge only their own arrests.

First Amendment protection to nude dancing. However, the Washington Supreme Court interpreted this Court's opinion in *City of Erie v. Pap's A.M.* as having "stated clearly, for perhaps the first time, that nude dancing is expressive conduct."[11] In reliance on this interpretation, the Washington Supreme Court apparently felt compelled to extend the protections of the First Amendment to all conceivable acts by an adult entertainer. *Pap's A.M.* does not compel or support the new protections granted by the Washington court.

Pap's A.M. involved a challenge to Erie's general prohibition on public nudity. In evaluating the ordinance, this Court noted that, "By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." 529 U.S. at 290. Despite this statement, the Washington court effectively held that Seattle's ordinance governing the conduct of adult entertainers can never regulate pure alone.

Like Erie's statute, Seattle's adult entertainment ordinance is not aimed specifically at suppressing expression, but is intended to regulate conduct. By its terms, Seattle's ordinance regulates sex acts. It does not target sex acts that contain an erotic message: rather it bans specific sex acts in adult entertainment establishments. It also contains the proviso that the statute not be applied to infringe upon protected expression, consistent with this Court's ruling in *Miller v. California*, 413 U.S. 15 at 23-24 (1973). SMC 6.270.100(C) and (D).

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[11] App., *infra*, 17 (144 Wn.2d at 278).

This Court has previously rejected the premise that a ban on nudity is necessarily related to suppressing the expressive message of a nude dancer. *Erie v. Pap's A.M.*, 529 U.S. at 293. The Washington Supreme Court's ruling that a conduct arrest under Seattle's adult entertainment ordinance automatically impacts protected expression is in conflict with *Pap's A.M.*

Prior to *Pap's A.M.*, this Court issued a line of opinions refusing to extend presumptive First Amendment protections to all activities that occur on a stage, beginning with a 1973 opinion:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973). Notably, there is no evidence that Silva or Kidder intended any expression during their activities. Yet, by virtue of having committed the sex acts on stage, Washington's court found the acts to be protected as speech.

Over a decade later, this Court again refused to grant presumptive First Amendment protections to conduct obviously capable of being committed without any expressive intent:

> In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973), we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct.

Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986). The *Arcara* opinion rejected the First Amendment claims of an adult bookstore that was subjected to closure efforts because of prostitution and lewdness on the premises. In doing so, this Court found that activities such as masturbation, fondling, fellatio and solicitation of prostitution manifest "absolutely no element of protected expression." 478 U.S. at 705. In the absence of evidence to the contrary, it was error for the Washington Supreme Court to find otherwise in this case. Notably, *Pap's A.M.* did not overrule either *Paris Adult Theatre I* or *Arcara*.

Several years later, this Court reversed a Seventh Circuit decision finding that nude dancing was expressive conduct, noting as follows:

> [N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only

> marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue ....

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991). During its analysis, this Court concluded that "Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity." *Id.* at 571.

Given the analysis of this Court in *Barnes*, it is impossible to imagine that the Court would consider all acts by a nude dancer to be expressive:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.
>
> * * *
>
> It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Id. at 570 (citations omitted). *Pap's A.M.* did not overrule *Barnes* in this respect. Instead, *Pap's A.M.* relied upon *Barnes* in approving the constitutionality of the Erie ordinance, which was modeled upon the ordinance from *Barnes*.

There can be no argument that the state can legitimately regulate public masturbation and other sex acts. However, according to the Washington courts, those acts are now presumptively expression when committed by adult entertainers on stage[12]. This Court previously rejected presumptive protections for sex acts on stage in *Paris Adult Theatre I, supra.* The Washington courts are in direct conflict with this Court. The petition should be granted.

B. Review is warranted because this Court should resolve the important federal question regarding the level of First Amendment protections for adult entertainers subject to arrest for violating conduct ordinances.

A petition for a writ of certiorari will be granted only for compelling reasons. When a state court decides an important question of federal law that should be settled by this Court, a compelling reason under Supreme Court Rule 10 is established. According to the Washington court in *Furfaro,* the First Amendment requires that police officers making an arrest for criminal conduct under Seattle's adult

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[12] It is relatively easy to conjure up hypotheticals illustrating that presumptive First Amendment protections should not apply to all conduct by adult entertainers. The conduct at issue is obviously capable of being done without expressive intent, as evidenced by Kidder and Silva in this case. Hypothetical criminal conduct such as sex acts, smoking marijuana, forging signatures, or committing perjury ought not be afforded First Amendment protection merely by moving the actor to a stage. In fact, it is difficult to conceive of a criminal act that *should* be automatically protected if done on stage.

entertainment ordinance must have probable cause to believe that they have witnessed obscenity, regardless of whether the actors intended to convey any expression via their actions. In effect, all adult entertainers would be immune from arrests for criminal conduct, and subject only to arrest for obscene expression.[13] This Court has not yet decided whether the Fourth Amendment's probable cause inquiry must include a finding of obscenity for all arrests of adult entertainers. These are important questions of federal law that should be settled by this Court.

Public indecency statutes and adult entertainment ordinances are designed to protect morals and public safety. As this Court noted in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569-570 (1991), "the public indecency statute furthers a substantial government interest in protecting order and morality. This interest is unrelated to the suppression of free expression." As Justice Souter noted in his concurring opinion, it is "no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*." *Id.* at 584 (citing to *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

"'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v.*

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[13] After all, obscenity pertains to expression, not conduct.

DeFillippo, 443 U.S. 31, 36 (1979). In light of the Washington court's decision, an officer who believes he has probable cause to make an arrest for conduct prohibited by Seattle's ordinance (such as masturbating, self-massaging, or simulated intercourse) will now be forced to consider whether he is witnessing obscenity, even if he has no reason to believe that the conduct he is witnessing has any expressive element. The resulting burdens on law enforcement are obvious and significant. In contrast, any benefit is utterly hypothetical in this case, as neither Kidder nor Silva testified regarding any attempts at all to express herself through self-massage, electing instead to testify that no such acts were committed[14].

Given this Court's rulings that adult entertainment ordinances are not content based, in conjunction with this Court's rulings that nude dancing clings only to the outer fringe of First Amendment expression, the States need an answer from this Court as to how lawful arrests under such statutes can be made. This Court has rightly reserved presumptive free speech protections for pure speech. An actor who intends her conduct to have a First Amendment element ought to have the burden of proof to establish said communicative element, rather than having it presumptively granted to her by the Washington court, in clear contravention of this Court's prior rulings. This is a matter of constitutional significance as well as sub-

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[14] Further, manager Furfaro testified that he would have not permitted Kidder or Silva to attempt digital penetration, pinching her nipples, or rubbing her nipples or breasts. App., *infra*, 50-53 (Rep. Tr., Dec. 9, 1997, at 13-16).

stantial public interest, which should be addressed by this Court.

CONCLUSION

Absent review by this Court, police officers in Washington will effectively be prohibited from arresting adult entertainers for criminal conduct. Instead, adult entertainers will be free to commit any conceivable act, secure in the knowledge that their actions are only constrained by obscenity standards. There are important Constitutional considerations at stake. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC.,	NO. 68971-7
Respondents,	EN BANC OPINION
v.	Filed August 2, 2001
THE CITY OF SEATTLE,	
Petitioner.	

OPINION: GUY, J.* -- Petitioner the City of Seattle (City) seeks review of a decision by the Court of Appeals, Division One, in *Furfaro v. City of Seattle*, 97 Wn. App. 537, 551, 984 P.2d 1055 (1999), which held that the warrantless arrests of respondents Nick Furfaro, Brandy Kidder, and Esmeralda Silva (Respondents) based on the nude dancers' alleged violation of Seattle Municipal Code (SMC) 6.270.100(A)(2) violated their rights afforded by the First and Fourteenth Amendments to the United States Constitution. After one of the defendant dancers was acquitted and the charges against the remaining defendants dismissed, Respondents sued the City and several officers individually. Respondents lost at the trial court level. The Court of Appeals reversed and remanded

* Justice Richard P. Guy is serving as a justice pro tempore of the Supreme Court pursuant to Const. art. IV, § 2(a).

for a new trial, and the City petitioned for review by this court. We limit our consideration to federal claims actionable under 42 U.S.C. § 1983 for an alleged violation of the First and Fourth Amendments. State constitutional claims for injunctive and declaratory relief arising under Washington Constitution article I, section 5, are remanded to the Court of Appeals, Division One, for further appropriate proceedings.

We affirm the judgment of the Court of Appeals but not its reasoning. We do not agree that the fact that the arrests of Respondents were accomplished without warrants violated their rights afforded by the First, Fourth, and Fourteenth Amendments to the United States Constitution. *See Furfaro*, 97 Wn. App. at 550-51. Also, Respondents' 42 U.S.C. § 1983 claim for violation of rights secured by the Washington State Constitution fails to assert a section 1983 claim. Nevertheless, we remand for a new trial Respondents' claim against the City under 42 U.S.C. § 1983 because we find their case was prejudiced by an erroneous and misleading jury instruction. The instruction allowed the jury to ignore the exception for protected expression contained in SMC 6.270.100(C) and to find that the arresting officers had probable cause without the jury's considering whether there were reasonable grounds to believe that the conduct was obscene. The Respondents' claim, that their Fourth Amendment rights were violated because the officers lacked probable cause to make the arrests, was prejudiced by the erroneous instruction. Therefore, we reverse the trial court's judgment of dismissal and remand this case for a new trial consistent with this opinion.

FACTS

On November 20, 1995, two undercover officers of the Seattle Police Department entered Rick's, an adult nonalcoholic nightclub in Seattle. Reporter's Transcript on Appeal (Rep. Tr.) (Dec. 10, 1997) at 146-47; *Furfaro*, 97 Wn. App. at 539. The officers were to look for violations of the standards of conduct ordinance. Rep. Tr. at 147 (Dec. 10, 1997). One of the detectives observed the stage dancers inside the club and tape-recorded his observations. *Furfaro*, 97 Wn. App. at 542. Typical of the recorded observations is this example: "Gabrielle on the main stage black sparkling string bikini. She touched her anus, buttocks, massaged her breasts. Gabrielle has long brown hair, slightly on the heavy side." Opening Br. of Appellants at A-27 (Swanson Tape). After making these observations the detective left and met with other officers. *Furfaro*, 97 Wn. App. at 542. The officers returned to Rick's and arrested 13 dancers, including Kidder and Silva, and the club manager, Rick Furfaro. *Id.* at 539, 542. The arrests were made without a warrant. *Id.* at 539.

On July 15, 1996, one of the dancers was tried and acquitted in Seattle Municipal Court; the City dismissed the charges against the other defendants. *Id.* at 539. Furfaro, Kidder, and Silva then sued the City and several individual police officers. 97 Wn. App. at 539-40. In a summary judgment order, issued on July 3, 1997, the trial court, among other actions, dismissed Respondents' state tort claims, found as a matter of law that warrants were not needed to arrest Respondents, found the individually named defendants were entitled to qualified immunity, and reserved for trial the issues of (1) whether Kidder's and Silva's activities on stage were conduct or expression and if expression, whether they were obscene, and (2) Respondents' claim for injunctive and declaratory

relief. Clerk's Papers at 562-63. The jury found that police did have probable cause to arrest Respondents for violating SMC 6.270.100. *Furfaro*, 97 Wn. App. at 540. Judgment on the jury verdict was issued on January 23, 1998. Clerk's Papers at 893-94. On February 10, 1998, the trial court also denied Respondents' motion for judgment as a matter of law or in the alternative denied a new trial. Clerk's Papers at 928-29.

On appeal, only Respondents' claim for damages under 42 U.S.C. § 1983 was at issue. *Furfaro*, 97 Wn. App. at 540. The Court of Appeals held that the police should have obtained a warrant for the arrests and that Respondents were entitled as a matter of law to an instruction that the warrantless arrest was a deprivation of their rights under the United States Constitution. 97 Wn. App. at 540-41. The appeals court reversed the judgment of dismissal and remanded for a new trial. *Id.* at 541. The court also revived Respondents' claims for injunctive and declaratory relief under the state and federal constitutions and remanded these claims for further proceedings. *Id.* at 552. The trial court's dismissal of Respondents' damage claim against the individual defendants was affirmed. *Id.* The City filed a petition for review on December 6, 1999, assigning error to the Court of Appeals' decision and urging reversal.

ISSUES

(1) Were the warrantless arrests of Furfaro, Kidder, and Silva for violations of SMC 6.270.100 a deprivation as a matter of law of their rights under the

First and Fourteenth Amendments of the United States Constitution?[1]

(2) May a person filing a claim under 42 U.S.C. § 1983 recover for the deprivation of rights secured by the Washington State Constitution and Washington law?

(3) Did the police officers have probable cause to make arrests under SMC 6.270.100 when they arrested the performers for conduct without determining whether the conduct was protected expression under SMC 6.270.100(C)?

DISCUSSION

The Court of Appeals in *Furfaro* held that warrantless arrests under SMC 6.270.100(A)(2) are a prior restraint, and therefore unreasonable under the Fourth Amendment. *Furfaro*, 97 Wn. App. at 550. The Court of Appeals concluded that before making arrests for violations of the ordinance, the City must obtain a judicial determination of probable cause in which the court is able to focus searchingly on the question of obscenity. *Id.* at

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[1] Kidder and Silva were arrested for violations of SMC 6.270.100(A)(2). Clerk's Papers at 319, 363. Furfaro was arrested for violating SMC 6.270.100(A)(5), which reads, "No manager or operator shall knowingly permit any person upon the premises to touch, caress, or fondle the breasts, buttocks, anus, genitals or pubic region of another person." Since the officers seemed to observe only solo violations of the standards of conduct, perhaps Furfaro should have been charged under SMC 6.270.100(A)(12): "No manager or operator shall knowingly or recklessly permit or allow any employee or entertainer to violate any provision of this chapter." Nevertheless, for the purposes of this action his claim for relief rests upon Kidder's and Silva's claims. If the officers did not have probably cause under SMC 6.270.100(A)(2) to arrest Kidder and Silva, they did not have probable cause to arrest Furfaro.

539. On the other hand, in its petition for review the City assigned error to the appeals court's conclusion that a warrant was required. Pet. for Review at 2. The City argues that the appeals court's holding that live performances are entitled to the same protection under the First Amendment as that afforded to books and films has no legal precedent. Pet'r's Suppl. Br. at 19. According to the City, the United States Supreme Court has refused to extend presumptive First Amendment protection to all activities that occur on a stage (Pet. for Review at 11-12 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991))), and has reiterated that conduct by adult entertainers is not entitled to the same protections as books, films, and political speech in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). Pet'r's Suppl. Br. at 19.

The Court of Appeals itself recognized that there is little authority to support a warrant requirement in cases such as this one. Although the United States Supreme Court in *Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973), held that a seizure of a film from a commercial theater without first obtaining a warrant was a prior restraint and hence unreasonable, the "Supreme Court has not yet decided whether a warrant requirement similarly applies to arrests of persons for activities arguably protected by the First Amendment." *Furfaro*, 97 Wn. App. at 543. In a case discussed by the *Furfaro* court, *Maryland v. Macon*, 472 U.S. 463, 465-66, 471, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), the Supreme Court assumed without deciding that the warrantless arrest of a clerk in an adult bookstore was an unreasonable seizure: "We leave to another day the question whether the Fourth

Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials." *Id.* at 471.

The case to be made for a warrant requirement for the arrest of persons involved in category of live performances called nude dancing is even weaker than it is for persons involved with books and film because such performances receive less protection under the First Amendment than do books and film. The *Furfaro* court cites *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975), as supporting the proposition that live performances are entitled to the same First Amendment protection against censorship as are books and film. *Furfaro*, 97 Wn. App. at 544. But the Court in *Salem Inn* assigned a low level of protection to the kind of live performances, i.e., nude dancing, at issue: "Although the customary 'barroom' type of nude dancing may involve only the *barest minimum of protected expression*, we recognized in *California v. LaRue*, 409 U.S. 109, 118[, 93 S. Ct. 390, 34 L. Ed. 2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Salem Inn*, 422 U.S. at 932 (emphasis added).[2] The *Salem Inn* Court sustained a district court's preliminary injunction enjoining enforcement of a local ordinance which prohibited topless dancing bars; the Court agreed with the district court not because it wished to protect nude dancing but because the ordinance was overbroad and would have prohibited "'the performance of the "Ballet Africains" and a number of other works of

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[2] Affording the "barest" of constitutional protection to the barest forms of expression supports the statement of Justice Hale in *State v. Dixon*, 78 Wn.2d 796, 798, 479 P.2d 931 (1971), where he wrote, "There is nothing unconstitutional about common sense."

unquestionable artistic and socially redeeming significance.'" 422 U.S. at 933 (quoting *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478, 483 (1973), *aff'd*, 501 F.2d 18 (2d Cir. 1974)). In subsequent cases a divided Court continued to find support for only a minimal level of protection for nude dancing. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 566, the plurality opinion agreed that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."[3] Justice O'Connor's plurality opinion in *Pap's A.M.* continues the assignment of low value to this kind of entertainment: "nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection." *Pap's A.M.*, 529 U.S. at 284.[4] The *Furfaro* court correctly points out that decisions of this court have stated that the First Amendment does protect nude dancing. *Furfaro*, 97 Wn. App. at 544. However, this court's statements to that effect have been carefully qualified. In *O'Day v. King County*, 109 Wn.2d 796, 803, 749 P.2d 142 (1988), this court said, citing *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 140, 720 P.2d 818 (1986), that "although the

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[3] Although only three members of the Court signed Justice Rehnquist's plurality opinion, nude dancing receives at least as much protection as stated in that opinion because the three members of the dissent assert that it deserves much more protection. *See Barnes*, 501 U.S. at 593 (White, J., dissenting).

[4] The kind of protection actually given nude dancing is not applicable to this case. Both *Barnes* and *Pap's A.M.* concerned whether ordinances were unconstitutional. The plurality in *Pap's A.M.* stated that the level of scrutiny to be applied to an ordinance depends on whether the regulation is related to the suppression of expression. *Pap's A.M.*, 529 U.S. at 289. If the regulation is not so related, it need only satisfy the less stringent standard from *United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), for evaluating restrictions on symbolic speech. *Id.*

First Amendment protects the communication and expression of a nude dancer, public nudity itself is conduct subject to regulation." Moreover, *Barnes* and *Pap's A.M.*, United States Supreme Court cases decided subsequent to *O'Day*, are more authoritative indications of the amount of protection given to nude dancing by the First and Fourteenth Amendments to the United States Constitution.

With respect to the issue of whether a violation of the Fourth Amendment occurred because the arrests were a prior restraint and hence unreasonable, the Court of Appeals once again concedes that authority for its position is scant: "Neither the United States Supreme Court nor any Washington court has decided whether warrantless arrests of nude dancers in an adult nightclub are a prior restraint." *Furfaro*, 97 Wn. App. at 548. Only one decision from a court in a foreign jurisdiction, *People v. Adais*, 114 Misc. 2d 773, 452 N.Y.S.2d 543 (N.Y.C. Crim. Ct. 1982), has found such an arrest to be a prior restraint. An earlier decision, *People v. Morgan*, 86 Misc. 2d 377, 382, 382 N.Y.S.2d 666 (N.Y.C. Crim. Ct. 1976) of the same court came to the opposite conclusion.

The Court of Appeals also recognized, in its discussion of the qualified immunity issue, that the warrant requirement was not clearly established. The appeals court agreed that the trial court properly dismissed the claims against individual police officers because the officers had qualified immunity. *Furfaro*, 97 Wn. App. at 552. Qualified immunity protects government officials from civil liability "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" 97 Wn. App. at 551-52 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d

396 (1982)). Qualified immunity is appropriate in this case precisely because the right violated was not clearly established: "The contours of the right to perform a nude stage dance without fear of warrantless arrest are not clearly established. The lower courts from other states where the issue has been confronted have reached inconsistent results." 97 Wn. App. at 552.

Respondents argue that warrants are required to make the arrests because nude dancing receives the same protection under the First Amendment as do books and film. *Roaden*, 413 U.S. at 504, held that the police seizure of books or films without a constitutionally sufficient warrant is a form of prior restraint and unreasonable under the Fourth Amendment. Respondents point out that other courts have extended this warrant requirement to the arrests of those accused of possessing or distributing books or films. Answer to Pet. for Review at 14-15. *See, e.g., Penthouse Int'l v. McAuliffe*, 610 F.2d 1353, 1359 (5th Cir. 1980). The final step of Respondents' argument asserts that because the Supreme Court in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975), held that live drama receives the same level of First Amendment protection as do other forms of expression, live entertainers are entitled to be free from warrantless arrests. Answer to Pet. for Review at 16-19.

It is not at all clear, however, that *Southeastern* applies to nude dancing. The case arose when the directors of a municipal theater denied a promoter permission to put on a performance of the rock musical "Hair." *Southeastern*, 420 U.S. at 547-48. The Court held such a denial was a prior restraint. *Id.* at 552. Although Respondents would like this case to announce protection for "live performances" or "live entertainment" (Answer to

Pet. for Review at 16, 18-19), *Southeastern* appears to deal with a category of expression which excludes the kind of nude dancing at issue in *Furfaro*. The Court used terms such as "live drama" and "theater" to describe the kind of expression being affected and said that "theater usually is the acting out--or singing out--of the written word, and frequently mixes speech with live action or conduct." *Southeastern*, 420 U.S. at 557-58. Despite the live action or conduct aspects of theater, the Court based the protection given to theater on its verbal elements. *Id.* This reasoning applies to "Hair," but appears not to apply to the nonverbal nude dancing of the sort found in adult entertainment establishments. The Court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), did use the category "live entertainment," including nude dancing, because the ordinance at issue prohibited all live entertainment. The Court said that the appellants in *Schad*, operators of an adult bookstore which featured live dancers performing behind a glass panel, were entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own. *Id.* at 62, 66. Because of the overbreadth of the ordinance, the Court set aside the appellants' convictions without having to determine how much First Amendment protection should be extended to nude dancing. *Id.* at 65, 66. Therefore, the Supreme Court precedents cited by Respondents do not support the claim that the First Amendment affords nude dancing the same level of protection given to books and film.

Therefore, we decline to follow the reasoning of the Court of Appeals that a warrant is required to arrest nude dancers for violations of SMC 6.270.100. Under 42 U.S.C. § 1983 damages are awarded for the deprivation of rights secured by the United States Constitution and federal law. The right to have a warrant issued before an

arrest of this nature can be made has not been established by prior case law. On the contrary, the United States Supreme Court's reiterated opinion is that nude dancing only receives minimal protection under the First Amendment. That level of protection is insufficient to support the Court of Appeals' contention that a warrant is required by the First and Fourth Amendments even though no federal or Washington court had recognized such a requirement.

Having declined to follow the Court of Appeals in holding that the United States Constitution requires that warrants be issued in order to make arrests under SMC 6.270.100, we turn to Respondents' assertion that the Washington Constitution also requires warrants.

As the Court of Appeals noted, "[i]n this appeal, only [Respondents'] claim for damages under the federal civil rights statute, 42 U.S.C. § 1983, is at issue." *Furfaro*, 97 Wn. App. at 540. In addition to its claim that the City violated the First Amendment of the United States Constitution, Respondents also present, in the alternative, a claim under article I, sections 5 and 7 of the Washington State Constitution. See Pl./Resp'ts' Suppl. Br. at 4-12. The City contends that to the extent that Respondents claim a violation of a state law provision that provides greater protection than federal law, they have failed to assert a section 1983 claim. Pet'r's Suppl. Br. at 29. The City objects to any portion of Respondents' claims which depends on Washington State law. *Id.*

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The question before this court is whether the "constitution and laws" refers only to the United States Constitution and federal law or, in addition, to state constitutions and laws.

To state a cause of action under section 1983, a plaintiff must show that (1) the defendant acted under color of state law; and (2) that the defendant deprived the plaintiff of rights secured by the *Constitution or federal law*. *See Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990) (citing *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988)). *See also Torrey v. City of Tukwila*, 76 Wn. App. 32, 37, 882 P.2d 799 (1994). In *Barry* the plaintiff brought a section 1983 action, complaining that under California law an officer make a warrantless misdemeanor arrest only if he has reasonable cause to believe that a person has committed a misdemeanor in his presence, and that she did not commit the act in his presence. *Barry*, 902 F.2d at 772. The Ninth Circuit refused to consider whether a violation of California law occurred but only whether there was a violation of the Fourth Amendment. *Id.* In rejecting her claim, the court said she failed to allege a federal constitutional or federal statutory violation. 902 F.2d at 773.

Because section 1983 allows for the recovery of damages for violation of rights secured by the United States Constitution and federal law, a claim under article I, sections 5 and 7 of the Washington State Constitution does not come within the scope of 42 U.S.C. § 1983. We agree with the City that Respondents' claim for relief under 42 U.S.C. § 1983 for violation of rights under the Washington State Constitution fails to assert a section 1983 claim. In addition, Respondents' claim for violations of federal rights may not be supported by Washington case law to the extent that the case law depends upon the Washington Constitution.

We next consider whether the police officers had probable cause to make arrests under SMC 6.270.100 when they arrested the performers for conduct without determining whether the conduct was protected expression under SMC 6.270.100(C). The City claims that it had probable cause to make the arrests for violations of SMC 6.270.100(A)(2) even though no determination of obscenity pursuant to .100(C) and .100(D) was made. On the other hand, the Court of Appeals agreed with Respondents that a consideration of obscenity is essential to the determination of probable cause to arrest under SMC 6.270.100(A)(2). *Furfaro*, 97 Wn. App. at 546. The relevant portions of the ordinance read as follows:

> A. The following standards of conduct must be adhered to by employees of any adult entertainment premises:
>
> . . .
>
> 2. No employee or entertainer shall perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;

b. The touching, caressing or fondling of the breasts, buttocks or genitals; or

c. The displaying of the pubic region, anus, vulva or genitals; . . .

C. This chapter shall not be construed to prohibit protected expression, such as:

1. Plays, operas, musicals, or other dramatic works that are not obscene;

2. Classes, seminars and lectures held for serious scientific or educational purposes that are not obscene; or

3. Exhibitions, performances, expressions or dances that are not obscene.

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations, as measured against community standards, of:

a. Ultimate sexual acts, normal or perverted, actual or simulated, or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.[5]

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[5] The language of SMC 6.270.100(D) mirrors the language of *Miller v. California*, 413 U.S. 15, 23-24, 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973):

> State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. . . .
>
> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of the appellate courts to conduct an independent review of constitutional claims when necessary.

(Citations omitted.)

SMC 6.270.100(A)(2); (C)(1), (2), (3); (D)(1), (2), (3).

The police officers made arrests for violations of the standards of conduct and did not consider obscenity or make arrests for expression. Pet. for Review at 3-4, 5. The City argues that arrests for conduct under this ordinance are allowed under *O'Day and Everett v. Heim*, 71 Wn. App. 392, 859 P.2d 55 (1993). Resp'ts Br. at 17-18; Rep. Tr. (Dec. 16, 1997) at 116, 130. Both cases involved ordinances nearly identical to the City's with respect to the provisions at issue here; both ordinances contained standards of conduct and an exception for nonobscene dance. *See O'Day*, 109 Wn.2d at 799-800; *Heim*, 71 Wn. App. at 394. This court in *O'Day* upheld the constitutionality of the King County ordinance by construing it to restrict only conduct and unprotected expression. *O'Day*, 109 Wn.2d at 806. Similarly, under SMC 6.270.100, arrests may be made only for nonexpressive conduct and for unprotected expression. Utilizing that framework, the *O'Day* court agreed with the trial court that the performances engaged in by the defendants, evidently table dances or lap dances, constituted pure conduct unprotected by free expression guarantees. *O'Day*, 109 Wn.2d at 800 n.2, 803.

In a case decided last year, however, the Supreme Court stated clearly, for perhaps the first time,[6] that nude dancing is expressive conduct:

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[6] Despite the citation to previous cases, *Pap's A.M.* clarifies the issue. Any pronouncement made in the plurality opinion in Barnes is weakened by the fractured nature of that decision. *Pap's A.M.* itself does not have a majority opinion. However, Justice Souter states that he agrees with the analytical approach that the four-member plurality employs in deciding that case. *Pap's A.M.*, 529 U.S. at 310 (Souter, J., concurring in part, dissenting in part). Both *Barnes* (1991) and *Pap's A.M.* (2000) were decided subsequent to *O'Day*.

> Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes*, however, *nude dancing* of the type at issue here is *expressive conduct*, although we think that it falls only within the outer ambit of the First Amendment's protection. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. at 565-566 (plurality opinion); *Schad v. Mount Ephraim*, 452 U.S. 61, 66, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981).

Pap's A.M., 529 U.S. at 289 (plurality opinion) (emphasis added). Although the Court's statement is qualified by the phrase "of the type at issue here," its citation to other cases indicates it sees no relevant legal difference between the kind of nude dancing at issue in *Pap's A.M.* and that in *Barnes* and *Schad*. Hence, nude dancing of various sorts is, according to the Court, expressive conduct. Moreover, according to Justice Scalia, the kind of nude dancing at issue in *Pap's A.M.* was lap dancing. *Pap's A.M.*, 529 U.S. at 308 (Scalia, J., concurring). After *Pap's A.M.*, nude dancing is afforded the protection due to expressive conduct.

In Kidder's and Silva's case, if the performers were engaged in nude dancing, their activities would fall under the category of expressive conduct, not pure conduct. There is ample evidence in the record to indicate that the performers were dancing; the detective present testified to that effect. Rep. Tr. (Dec. 11, 1997) at 10. Thus, the performers were engaged in expressive conduct which potentially falls under the exception for protected expression in SMC 6.270.100(C). Since SMC 6.270.100(C) says that "[t]his chapter shall not be construed to prohibit protected expression," before officers may make arrests

for violation of the standards of conduct in SMC 6.270.100(A), the arresting officers or a judicial officer must make a determination, where expressive conduct is involved, that the expressive conduct is obscene as defined in SMC 6.270.100(D). In order to have probable cause to arrest Kidder and Silva, the City needed probable cause to believe that the dancers' expressive conduct was obscene and hence unprotected by the exception in .100(C).

The City concedes that "[t]here was absolutely no evidence at trial that any officer considered obscenity or made an arrest for expression." Pet. for Review at 5. However, that admission is not necessarily fatal to its claim that its officers had probable cause to make the arrests. "'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 36, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). The Supreme Court "described [*United States v.*] *Robinson*[, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)] as having established that 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (quoting *Scott v. United States*, 436 U.S. 128, 136, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978)). "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* Even though no officer determined that the activities of the performers was obscene, the arrests are not invalidated as long as the

facts and circumstances known to the arresting officer, viewed objectively, justify that action. "In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995) (citing *Yancey v. Carroll County*, 876 F.2d 1238, 1243 (6th Cir. 1989)). Here as long as the jury, viewing the facts and circumstances known to the arresting officer, determine that the performers' expressive conduct was obscene, they could go on to find that the officer had probable cause to make the arrests.

The City makes the further concession that the officer recording violations of the standard of conduct did not record any observations pertaining to obscenity. Pet. for Review at 3-4. The transcript of the audiotape made by the police detective contains observations related to violations of the standards of conduct but with hardly any observations related to expression at all. Opening Br. of Appellants at A-27 (Swanson Tape). He notes that the performers are on stage, but does not even say that they are dancing. *Id.* However, his trial testimony was more informative about the expressive features of the conduct. For example, he described the appearance of the stage and more of the dance routine of the performers including their use of the walls, mirrors, and clothing. Rep. Tr. (Dec. 11, 1997) at 5-7. More importantly, the jury was able to view a videotape made by one of the dancers at the behest of her counsel, a videotape which purported to represent what the stage dancing at Rick's looks like. Rep. Tr. (Dec. 10, 1997) at 38, 39, 47. Although the dancer in the videotape is not involved in the present action, the detective testified that her dance moves were similar to the dance moves of the other performers. Rep. Tr. (Dec. 11, 1997) at 7-8. He did complain that the videotape did

not contain the violations he saw on the day he recorded his observations. *Id.* at 15.

The jury appears to have significantly more information about the nature of the dances than did the magistrate about the content of the films at issue in *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986). In that case P.J. Video complained that the judge issuing the warrant to seize copies of their films did not have probable cause to believe that the movies were obscene. 475 U.S. at 869-70. The judge did not view the movies but issued the warrant on the basis of affidavits executed by an investigator who did view the works. *Id.* at 870. The information contained on each affidavit only went marginally further than the kind of comments made on the audiotape of the police officer in this case. See 475 U.S. at 878-84. The Supreme Court found that the affidavits contained more than enough information to support a conclusion that the movies satisfied all three elements of the definition of obscenity, even the third one regarding literary, artistic, political, and scientific value and hence that the warrant was supported by probable cause. 475 U.S. at 876-77. Here the transcript of the audiotape, the detective's testimony, and the videotape of the typical dance done on Rick's stage are sufficient "facts and circumstances" for a jury to be able to make a determination as to whether the dance was obscene, including whether the dance lacked artistic value.

But under this ordinance and in light of the facts of this case, a jury's finding that there was probable cause to make arrests under the ordinance must be supported by a determination that a reasonable person would believe that the expression of the dancers was obscene and hence unprotected. Respondents contend that the trial court

committed error when it declined to instruct the jury that consideration of obscenity was necessary to the determination of probable cause; they argue that the supplemental instruction to the jury was misleading and not a correct statement of the law. Opening Br. of Appellants at 58. "When reviewing a claim of error relating to jury instructions, the court must give consideration to the entire charge as a whole to determine whether the instruction is misleading or incorrectly states the law to the prejudice of the objecting party." *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986). "'An erroneous instruction is not otherwise reversible unless the court is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations."'" *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1117 (7th Cir. 1983) (quoting *Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982) (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981))). "'The question on appeal is not whether an instruction was faultless in every respect, but whether the jury, considering the instruction as a whole, was misled. . . . Thus, only in those cases where the reviewing court has a substantial doubt whether the jury was fairly guided in its deliberations should the judgment be disturbed.'" *Aero Int'l, Inc. v. United States Fire Ins. Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983) (quoting *Mid-Texas Communications Sys., Inc. v. AT&T*, 615 F.2d 1372, 1390 n.16 (5th Cir. 1980)). "A new trial is the appropriate remedy for prejudicial errors in jury instructions." *Id.*

During its deliberations, the jury sent the trial judge this inquiry: " # 2. In regards to determining 'probable cause' must we consider obsenity [sic] e.g. can actions in section 'A' be allowed because of section 'C' in Municipal Code 6.270.100." Clerk's Papers at 878. The trial court replied, "2) In determining probable cause, an

arresting officer making an arrest for expression, must consider obscenity. In determining probable cause, an arresting officer making an arrest for conduct, need not consider obscenity." *Id.* The instruction incorrectly states the law because an officer making an arrest for conduct must consider obscenity if the conduct is expressive, as was the case here, and because a jury determining whether an officer had probable cause to make the arrests here must consider whether a reasonable person would believe that the expressive conduct was obscene. Given the fact that the City stressed that the arrests were made for conduct and not for expression (Rep. Tr. (Dec. 10, 1997) at 151-52; Rep. Tr. (Dec. 11, 1997) at 43-45; Rep. Tr. (Dec. 17, 1997) at 67, 70), it is likely that the instruction led the jurors to conclude that they did not need to make a determination that a reasonable person would believe that the dances were obscene in order to find that probable cause existed. If, as seems likely, the jurors so concluded, the exception in SMC 6.270.100(C) becomes a nullity, and the protection potentially afforded to Respondents under the ordinance was mistakenly denied.

Because of our substantial doubt that the jury was fairly guided and because we find the error prejudicial to Respondents, a new trial is the appropriate remedy. Respondents' claims that their Fourth Amendment rights were violated because the arresting officers did not have probable cause to make the arrests under the ordinance cannot be fairly evaluated unless the entire ordinance, including section C, is given effect.

Because we decide this case for different reasons than did the Court of Appeals, we must address the issue of qualified immunity. The appeals court held that the arresting officers had qualified immunity because their conduct did not violate clearly established statutory or

constitutional rights. *Furfaro*, 97 Wn. App. at 551-52. The Court of Appeals recognized that the warrant requirement upon which it decided Respondents' case was not clearly established. 97 Wn. App. at 551. Although we do not agree that the officers needed a warrant to make the arrests in this case, we similarly recognize that *O'Day* provides a basis for believing that nude dancing may be considered pure conduct and not expressive conduct. That proposition is no longer true after *Pap's A.M.*, a case decided after the arrests were made. Because the arrests did not violate a clearly established constitutional right of which a reasonable person would have known, we affirm the Court of Appeals on the issue of qualified immunity and affirm the trial court's dismissal of the claims against the individual police defendants.

At the new trial all of the questions on the special verdict form may be considered by the jury except for the fourth question and questions arising from it: "Did the arresting officers subject either of the following plaintiffs to an unreasonable arrest procedure?" Clerk's Papers at 885. Respondents do not contest the jury's negative answer to that question.

Although we remand Respondents' claim for damages under 42 U.S.C. § 1983 for a new trial, we do so on grounds other than those found by the Court of Appeals. As a consequence of the different reasoning, the relief available is also different. Pursuant to RAP 13.7(b), this case is remanded to the Court of Appeals to consider the availability of injunctive or declaratory relief under the state constitution and issues left unresolved in this opinion.

CONCLUSION

We affirm the judgment of the Court of Appeals but on different grounds. We do not agree that warrants were required to make the arrests under the requirements of the federal constitution in this case. Nevertheless, because we find that a jury instruction was erroneous and misleading, and that the error was prejudicial to respondents, we reverse the trial court's judgment of dismissal and remand this case to the Court of Appeals for further proceedings consistent with this opinion.

WE CONCUR:

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Smith, J.

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Johnson, J.

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Madsen, J.

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Sanders, J.

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Ireland, J.

_____
Bridge, J.

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Guy, J.P.T.

SANDERS, J. (concurring)--I concur only with the majority's result for the reasons so well articulated by

Judge Becker on behalf of the Court of Appeals. *See Furfaro v. City of Seattle*, 97 Wn. App. 537, 542-51, 984 P.2d 1055 (1999), *review granted*, 140 Wn.2d 1012, 5 P.3d 8 (2000).

In summary, when an activity enjoys legal protection unless obscene, an arrest warrant must be obtained from the judiciary. This is because obscenity determinations are ordinarily judicial ones, and, moreover, the alternative to an after-the-fact execution of a warrant is the prior restraint implicit in a midperformance arrest.

The majority's claimed distinction between the admitted necessity of a warrant to seize a videotape and the supposed propriety of a warrantless arrest of a performer in midperformance defies common sense.[1] As in the case of the warrantless seizure of a film, "Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" *Roaden v. Kentucky*, 413 U.S. 496, 506, 93 S. Ct. 2796, 2802, 37 L. Ed. 2d 757 (1973) (quoting *Heller v. New York*, 413 U.S. 483, 488-89, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973)). The principle is the same in either case. But it is even more applicable to a live performance than a film because the film may be preserved and shown again but the performance is gone forever. *See also People v. Adais*, 114

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[1] Cf. majority at 7 n.2 (quoting *State v. Dixon*, 78 Wn.2d 796, 798, 479 P.2d 931 (1971)),"'There is nothing unconstitutional about common sense.'" If anything, the reverse to the majority's view would be more nearly correct. "It is almost preposterous to believe that systems of censorship prohibited by our Constitution as to book publishers and film producers ought not be prohibited as to our dancers, actors and comedians." *People v. Adais*, 114 Misc. 2d 773, 452 N.Y.S.2d 543, 546 (N.Y. Crim. Ct. 1982).

Misc. 2d 773, 452 N.Y.S.2d 543, 545-46 (N.Y. Crim. Ct. 1982).

I would contend the issue is not whether the police guessed right, but rather whether the police should be in a position to guess at all.

IN THE COURT OF APPEALS
OF THE STATE WASHINGTON

DIVISION I

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC., Appellants, v. CITY OF SEATTLE; STEVE BUTLER and JANE DOE BUTLER; DAN OLIVER and JANE DOE OLIVER; MIKE NELSON and JANE DOE NELSON; and RICHARD NIEMIC and JANE DOE NIEMIC, Respondents.	NO. 43409-8-1 OPINION

BECKER, J. - The First Amendment protects non-obscene nude dance performances in an adult nightclub. Before making arrests for violations of a standards of conduct ordinance that prohibits stage dancers from sexual self-touching during a performance, a municipality must obtain a judicial determination of probable cause in which the court is able to focus searchingly on the question of obscenity. Without a warrant, such arrests operate as a prior restraint and a form of unconstitutional censorship. The appellants' federal civil rights damage claim is reinstated and allowed to proceed on the theory that their warrantless arrests were a constitutional deprivation as a matter of law.

SUMMARY

On the afternoon on November 20, 1995, Seattle police went to Rick's, an adult non-alcoholic nightclub in Seattle operated by JJR, Inc. under an adult entertainment license issued by the City of Seattle. Without first obtaining a warrant, they arrested thirteen entertainers and the club manager, Rick Furfaro, for misdemeanor violations of Seattle's standards of conduct ordinance for adult entertainment establishments. The police required the dancers to change clothes and hand over their costumes as evidence. Afterwards, the dancers were handcuffed and transported to the King County Jail. Furfaro closed the club temporarily while the police processed the arrests.

The City tried one of the dancers in Seattle Municipal Court on July 15, 1996. A jury acquitted her. The City then dismissed the charges against the other defendants.

Furfaro and two of the dancers, Brandy Kidder and Esmerelda Silva, then sued the City and several individual police officers for damages. They also sought injunctive and declaratory relief to prevent the defendants from continuing to deprive them of rights protected by the federal and state constitutions. Ruling on pretrial motions for summary judgment, the trial court rejected as a matter of law the plaintiffs' assertion that the failure of the police to obtain a warrant for the arrests made the arrests unlawful. The court held that the individual police officers were entitled to qualified immunity. The court allowed a jury to decide whether the police had probable cause to arrest the plaintiffs for violating the standards of conduct. The jury found the police did have probable cause. The trial court entered a judgment on the

verdict. Appellants moved for judgment as a matter of law or, in the alternative, a new trial. They reasserted their argument that a warrant was required. The trial court denied the motion, and this appeal followed.

In this appeal, only the appellants' claim for damages under the federal civil rights statute, 42 U.S.C. sec. 1983, is at issue. The trial court dismissed all state law tort claims due to the appellants' failure to comply with the claim filing requirement of RCW 4.96.020(4), a ruling to which they have not assigned error. The trial court found that the plaintiffs' requests for injunctive and declaratory relief under the State Constitution remained viable despite noncompliance with the claim-filing statute, but nevertheless dismissed claims for injunctive and declaratory relief under both the state and federal constitutions along with all other claims in the judgment of dismissal entered after the trial.

The order denying the motion for a new trial was predicated upon a ruling of law. Therefore, no element of discretion is involved and our task as an appellate court is to determine whether applicable legal principles support the trial court's ruling. *See Sweek v. Metro Seattle*, 45 Wash. App. 479, 482, 726 P.2d 37 (1986).

We conclude that the police should have first obtained a warrant for the arrests, and that the plaintiffs were entitled as a matter of law to an instruction that the warrantless arrest was a deprivation of their rights under the United States Constitution. Because the trial court's erroneous pretrial ruling that no warrant was necessary shaped the rest of the trial to the prejudice of the appellants, we reverse the judgment of dismissal and remand for a new trial.

BACKGROUND

Rick's has two stages for nude dancing. The stages are eighteen inches off the ground and six feet from the nearest customer as required by the ordinance, Seattle Municipal Code (SMC) 6.270.100(A)(1), and are surrounded by flashing lights. The entertainers wear costumes usually consisting of a bra and panties. The music is prerecorded. A disc jockey in a booth announces which entertainer will be performing on stage. The entertainers perform in rotation, going from one stage to another. Each stage performance typically lasts two to three minutes and consists of a rhythmic dance routine including a strip tease. Entertainers can earn money if their stage dances inspire patrons to request and pay for individual table dances. Entertainers may not mingle with patrons while in a state of undress, and may not at any time engage in any type of sexual conduct or fondling with other persons. SMC 6.270.100(A)(3),(4), and (5).

The section of the ordinance under which Kidder and Silva were arrested prohibits entertainers from touching their private areas or simulating intercourse, masturbation, and other sexual acts. SMC 6.270.100(A)(2). The section under which Furfaro was arrested makes managers responsible for the dancers' violations. SMC 6.270.100(A)(12). On the afternoon of the arrests, a detective spent about an hour in the nightclub as part of a planned undercover police operation targeted at the stage dancers at Rick's. His assignment was to watch the stage dancers and look for behaviors that violated the Seattle ordinance, specifically breast and genital touching and simulated masturbation. Neither the detective nor any other officer involved in the operation was directed to evaluate the performance as a whole or to make any judgment about whether it was obscene.

Observing the stage dances inside the club, the detective covertly tape-recorded his observations. He described an entire rotation of fourteen dancers, noting for each one her stage name, a description of her costume, and the conduct violations he observed. He reported on the first two dancers, for example, as follows:

> Gabrielle on the main stage black sparkling string bikini. She touched her anus, buttocks, massaged her breasts. Gabrielle has long brown hair, slightly on the heavy side.
>
> Silver is on the main stage. She is wearing white t-bar panties, white silky top. She has short blonde hair and a tattoo on her left upper arm and one on her left calf. She just massaged her breasts, pinched her nipples and is now massaging her vagina.

The detective later testified in the criminal trial of one of the entertainers that each instance of self-touching he observed lasted two or three seconds. He described the performances as "dances" and said he found little difference between one dance and another.

After recording his observations, the detective left the club and met with other police officers to match the dancers with their entertainment licenses. Later that day, after deciding that thirteen of the dancers observed by the detective had engaged in conduct prohibited by the ordinance, the police returned and made the arrests. The City took one case to trial. After the trial ended with a jury verdict acquitting the dancer, the City dismissed

charges against the other defendants, and the plaintiffs instituted the suit that is the subject of this appeal.

WARRANT REQUIREMENT

Because of the risk of prior restraint and censorship, the First Amendment imposes special constraints on searches for and seizures of materials that are presumptively protected as expression. *Marcus v. Search Warrant*, 367 U.S. 717, 731-32, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961). Recognizing the complexity of the obscenity test, the United States Supreme Court has held that a warrant to seize allegedly obscene published materials may not be issued based merely on a police officer's conclusory assertion that the content is obscene, but must be sufficiently particularized to enable the issuing magistrate to "focus searchingly on the question of obscenity." *Marcus*, 367 U.S. at 732; *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873-74, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986). Whether a seizure of materials that are presumptively protected under the First Amendment is reasonable under the Fourth Amendment must be examined in the light of the values of freedom of expression. For this reason, the government may not seize a film from a commercial theater regularly open to the public without first obtaining a warrant. Such a seizure is unreasonable, "not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

The Supreme Court has not yet decided whether a warrant requirement similarly applies to arrests of persons for activities arguably protected by the First

Amendment. In *Maryland v. Macon*, 472 U.S. 463, 465-66, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), a clerk in an adult bookstore appealed his conviction for distributing obscene materials. The police had arrested him without a warrant after purchasing two magazines and concluding they were obscene. The Supreme Court decided that the purchase of magazines was not a seizure. Assuming without deciding that the warrantless arrest was an unreasonable seizure, the Court held that the magazines did not have to be excluded from the evidence at trial because they were already legitimately in the hands of the police when the arrest occurred. "We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials." *Macon*, 472 U.S. at 471.

A question similar to the one left open in *Maryland v. Macon* is now before this court. Live performances are entitled, no less than books and film, to the same protection of the First and Fourteenth Amendments against unlawful censorship. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975). Although public nudity is conduct that has no constitutional protection, the First Amendment protects the communication and expression of a nude dancer. *O'Day v. King County*, 109 Wash. 2d 796, 803, 749 P.2d 142 (1988). Topless entertainment in adult nightclubs and barroom nude dancing are forms of expressive conduct that enjoy some degree of constitutional protection. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); *BSA, Inc. v. King County*, 804 F.2d 1104, 1106-07 (9th Cir. 1984); *Chase v. Davelaar*, 645 F.2d 735, 737 (9th Cir. 1981). Because the nude stage performances at Rick's were presumptively protected by the First Amendment, the appellants (collectively, Furfaro) contend the warrant requirement as established

in *Marcus* and *Roaden* is equally applicable to their arrests as a means to secure a judicial determination of obscenity.

The City's response attempts to sidestep the concept of obscenity. In the City's analysis, the police arrested the dancers solely on account of their conduct, not because their expression was obscene. The City starts from the premise that nude conduct has no constitutional protection. *See O'Day v. King County*, 109 Wash. 2d at 803. The City then misconstrues *O'Day* as creating for police the opportunity to decide whether they are arresting stage dancers for conduct or for expression. According to the City, the question of obscenity does not arise unless it becomes necessary to decide whether expression is obscene or not, and that necessity does not arise so long as the police are clear that they are arresting only for conduct. The City thus strives to maintain, for purposes of establishing probable cause to arrest, a bright-line categorical barrier between the concepts of "conduct" (no consideration of obscenity required) and "expression" (must be separated into "obscene" and "non-obscene").

In *O'Day v. King County*, our Supreme Court held with respect to a similar ordinance that the standards of conduct by themselves are "overly broad and reach protected expression." *O'Day*, 109 Wash. 2d at 806. In light of *O'Day*, the Seattle ordinance, SMC 6.270.100, is constitutional only because the standards of conduct in section (A)(2) are limited by the non-obscene dance exception in section (C).

> A. The following standards of conduct must be adhered to by employees of any adult entertainment premises:
>
> . . .

2. No employee or entertainer shall perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;

b. The touching, caressing or fondling of the breasts, buttocks or genitals; or

c. The displaying of the pubic region, anus, vulva or genitals; SMC 6.270.100(A)(2).

C. This chapter shall not be construed to prohibit protected expression, such as:

1. Plays, operas, musicals, or other dramatic works that are not obscene;

2. Classes, seminars and lectures held for serious scientific or educational purposes that are not obscene; or

3. Exhibitions, performances, expressions or dances that are not obscene.

SMC 6.270.100(C).

To define "obscenity", section (D) of the ordinance adapts the test set forth in *Miller v. California*:

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations, as measured against community standards, of:

a. Ultimate sexual acts, normal or perverted, actual or simulated, or

b. Masturbation, fellatio, cunnilungus, bestiality excretory functions, or lewd exhibition of the genitals or genital area; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape, or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value. SMC 6.270.100 (D). *See Miller v. California*, 413 U.S. 15, 23-24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

Under *O'Day*, the exception in section (C) is integral to the constitutionality of the regulation. Therefore, there must be an assessment that the performance "as a whole" is not protected expression under section (C) before the police may make an arrest under section (A)(2).

The City's solution of directing police officers to focus on body parts alone and ignore the performance is a

simple one, but it comes at the expense of sensitivity to the nuances of expression. A possible consequence of allowing police to enforce the section (A)(2) standards without considering the test for obscenity in section (D) is that dancers will be arrested for simulating sexual acts and touching certain body parts even though their activities are not patently offensive, and even if the performance has serious artistic value. We conclude that consideration of obscenity is essential to the determination of probable cause to arrest under SMC 6.270.100(A)(2).

Furfaro contends that the appropriate procedure for considering obscenity is an application for a warrant. Opposing a warrant requirement, the City relies on the rule that police officers may make warrantless arrests for misdemeanor violations that are committed in their presence. RCW 10.31.100; *State v. White*, 129 Wash. 2d 105, 108-09, 915 P.2d 1099 (1996). The City contends that this court, in *Torrey v. Tukwila*, 76 Wash. App. 32, 42, 882 P.2d 799 (1994), already decided that police may make warrantless arrests for violations of adult entertainment standards of conduct. But in *Torrey*, the arrested dancers conceded the existence of probable cause and did not contend on appeal that their arrest raised First Amendment concerns.

A physical arrest is a seizure under the Fourth Amendment and must be preceded by a determination that there is probable cause to believe the person arrested has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 213, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Therefore, a warrantless arrest should not be allowed in a situation where officers lack the ability to determine probable cause. The determination of probable cause to arrest stage dancers under section (A)(2), like the determination

of probable cause to seize books and films, calls for sensitive discernment. Constitutionally protected nude expression must be distinguished from public nudity that may legitimately be punished as pure conduct or obscene expression. The line to be drawn is an elusive one. The warrantless arrest rule of RCW 10.31.100 is inapplicable when this level of judgment is called for. See *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1359 (5th Cir. 1980), *cert. denied*, 447 U.S. 931, 65 L. Ed. 2d 1131, 100 S. Ct. 3031 (1980) (refusing to "apply a statute normally appropriate for the case of a fleeing robber to items presumptively protected by the First Amendment"). It is reasonable to permit action without prior judicial evaluation where there are exigent circumstances "in which police action literally must be 'now or never' to preserve the evidence of the crime". *Roaden*, 413 U.S. at 505. But the facts surrounding the arrests in this case do not present "now or never" circumstances any more than a seizure of books or films would.

Whether the seizure operates as a prior restraint is the primary factor to weigh in deciding whether a judicial warrant is necessary to authorize the seizure. The United States Supreme Court held in *Roaden v. Kentucky* that the precipitate seizure of a film by a police officer, without the authority of a constitutionally sufficient warrant, was "plainly a form of prior restraint" and therefore unreasonable under the Fourth Amendment. *Roaden*, 413 U.S. at 504. Furfaro contends that the arrests of the stage dancers similarly can be characterized as a prior restraint.

The City claims that our Supreme Court has already decided in *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 132, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077, 118 S. Ct. 856, 139 L. Ed. 2d 755 (1998), that restrictions on stage dancing are not a prior restraint

because they affect only conduct, not expression. But in Ino Ino, the Court was addressing a regulation requiring stage dancers to maintain an eight-foot distance between themselves and patrons. The Court concluded that the eight-foot rule limits only proximity, not the expressive aspect of stage dancing. The standard of conduct presently at issue prevents entertainers from performing certain movements and touching certain body parts as part of a dance routine. See SMC 6.27.100(A)(2). This standard, which the court had no occasion to address in Ino Ino, does tend to restrict the expressive aspect of nude stage dancing.

A prior restraint is an act that "prohibits future speech, as opposed to punishing past speech." *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 764, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056, 115 S. Ct. 663, 130 L. Ed. 2d 598 (1994). Neither the United States Supreme Court nor any Washington court has decided whether warrantless arrests of nude dancers in an adult nightclub are a prior restraint. Courts in Illinois and New York have reached opposite conclusions on the issue. When a Chicago trial court found a live dance performance to be analogous to a film, an Illinois appeals court reversed. *City of Chicago v. Hanson*, 105 Ill. App. 3d 1017, 1022, 435 N.E.2d 120, 61 Ill. Dec. 631 (1981). The court reasoned that no prior restraint issue was involved "as arrests can only be made after an observation of criminal activity takes place"; the evaluation by the police officer was not a final determination of the matter; and there was no conclusive evidence "that future performances or the operation of the theatre was impeded." *Hanson*, 105 Ill. App. 3d at 1021. The court also emphasized that live performances are not analogous to films. "The permanent nature of celluloid and other written materials facilitates a prior judicial determination of obscenity, unlike a live performance

with a capacity to be altered continuously and thus can move in and out the realm of illegitimacy." *Hanson*, 105 Ill. App. 3d at 1022. *But cf. City of Chicago v. Festival Theatre Corp.*, 88 Ill. App. 3d 216, 230-31, 410 N.E.2d 341, 43 Ill. Dec. 341 (1981), *aff'd*, 91 Ill. 2d 295, 63 Ill. Dec. 421, 438 N.E.2d 159 (1982) (the fact that the content of future expression is unknown is the very reason why prior restraint on live expression bears an even heavier presumption against its validity than prior restraint of books or films).

In contrast to *Hanson*, the Criminal Court of the City of New York has concluded that live performers "may be unfairly restrained by arrest not only from completing an ongoing performance but from performing again in the near future following arrest. Arrest effectively discourages not only the performer but his or her producers and patrons from allowing the same or similar performances to take place again." *People v. Adais*, 114 Misc. 2d 773, 776, 452 N.Y.S.2d 543 (N.Y.C. Crim. Ct. 1982). *But cf. People v. Morgan*, 86 Misc. 2d 377, 382, 382 N.Y.S.2d 666 (N.Y.C. Crim. Ct., 1976) (same court as in *Adais*, opposite conclusion; "We would have to stretch our imaginations beyond credible balance to take the position that the chilling effect in depriving the people of the City of New York from viewing the gyrations of a nude dancer in a topless bar is such a prior restraint as to reach First Amendment proportions.")

Comparing *People v. Adais* with *City of Chicago v. Hanson*, we conclude that *Adais* more carefully applies the First Amendment principles developed in *Marcus* and *Roaden*. We cannot dispense with the warrant requirement for live performances on the basis that it is too difficult to implement. The controversial content of human expressive activity does not have to be captured in

a film canister or within the covers of a book to make it worthy of protection. The "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S. Ct. 777, 96 L. Ed. 1098 (1952). These principles make freedom of expression the rule to which the warrant requirement must adapt. They do not require the various forms of expressive activity to adapt so as to facilitate applying for a warrant. As the Adais court commented, it is "almost preposterous to believe that systems of censorship prohibited by our Constitution as to book publishers and film producers ought not be prohibited as to our dancers, actors and comedians." *Adais*, 114 Misc. 2d at 776.

The arrests of the entertainers and manager at Rick's has an effect comparable to that created by the seizure described in *Marcus v. Search Warrant*. Like the distributor of magazines, the proprietor of Rick's may have every reason to believe the stage dancers' performances are "constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer" who can stop the performance and thereby intimidate other entertainers who might otherwise carry on with similar dance routines. *See Marcus*, 367 U.S. at 736. The right to a trial is not a remedy sufficiently immediate and effective to prevent the chilling effect of a wrongful arrest. *See Seattle v. Bittner*, 81 Wash. 2d 747, 757, 505 P.2d 126 (1973). We conclude that warrantless arrests under section (A)(2) of the Seattle standards of conduct ordinance are a prior restraint, and therefore unreasonable under the Fourth Amendment.

There are no insurmountable practical problems to a rule requiring police to obtain a constitutionally

sufficient warrant before making an arrest based on conduct witnessed during a live performance. It is not necessary that the court personally watch the performance; it is enough to provide testimony from observers who are able to describe the performance as a whole in sufficient detail to allow the court to focus searchingly on the question of obscenity. *See Adais*, 114 Misc. 2d at 777. The United States Supreme Court has discussed the level of detail necessary for an affidavit describing allegedly obscene films. *See New York v. P.J. Video*, 475 U.S. at 876-77. Our state constitution may, of course, require greater detail as it is even more hostile to prior restraints than the federal constitution. *See Ino Ino*, 132 Wash. 2d at 115; *JJR Inc. v. City of Seattle*, 126 Wash. 2d 1, 891 P.2d 720 (1995).

In conclusion, the warrantless arrests of appellants Furfaro, Kidder and Silva based on the dancers' alleged violations of section (A)(2) of the ordinance violated their rights afforded by the First and Fourteenth Amendments of the United States Constitution. In their damages claim under 42 U.S.C. sec. 1983, the appellants have demonstrated a constitutional deprivation as a matter of law.

Because the case must now be remanded for a new trial based on that premise, the trial court will have an opportunity to re-examine other issues raised in this appeal, including the existence of an official policy or custom, the availability of injunctive or declaratory relief under both the federal and state constitutions, and jury instructions. For us to rule on these issues on the present state of the record would be in the nature of rendering an advisory opinion, and we refrain from doing so.

QUALIFIED IMMUNITY

One issue that can be decided now is whether the trial court erred in dismissing, on the basis of qualified immunity, several individual police officers who participated in the arrests. Qualified immunity is a judicially created doctrine protecting government officials from civil liability for performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Once a defendant properly raises the issue of qualified immunity, the plaintiff bears the burden of proving that the right allegedly violated was clearly established at the time of the occurrence at issue. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). To be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Altshuler v. Seattle*, 63 Wash. App. 389, 395, 819 P.2d 393 (1991), *review denied*, 118 Wash. 2d 1023, 827 P.2d 1392 (1992).

The contours of the right to perform a nude stage dance without fear of warrantless arrest are not clearly established. The lower courts from other states where the issue has been confronted have reached inconsistent results. The trial court properly dismissed the claims against the individual police defendants based on qualified immunity.

ATTORNEY FEES

Appellants request an award of attorney fees and costs as prevailing parties under 42 U.S.C. sec. 1988.

Because the extent to which they have prevailed is as yet unknown, *see Sintra, Inc. v. City of Seattle*, 131 Wash. 2d 640, 663-66, 935 P.2d 555 (1997), an award of attorney fees is premature at this point. The request is denied without prejudice to renewing it in the trial court for fees incurred on appeal as well as at trial.

The judgment dismissing the appellants' federal damage claim against the City of Seattle, and their claims for injunctive and declaratory relief under the state and federal constitutions, is reversed and remanded for further proceedings. The judgment of dismissal of the appellants' damage claim against the individual defendants is affirmed.

AGID, A. C.J., and APPELWICK, J., concur.

THE SUPREME COURT OF WASHINGTON

NICK FURFARO, et al., Respondents, v. CITY OF SEATTLE, Petitioner.	NO. 68971-7. ORDER GRANTING RECONSIDERATION AND CHANGING OPINION

It is hereby ordered that respondents' motion for reconsideration is granted and the opinion in the above cause, as the same appears at 144 Wash. 2d 363, be changed as follows:

1. In the 10th line from the top of page 366, a period is inserted after the word "level" and the remaining portion of that sentence is deleted.

2. In the 13th line from the top of page 366, the following sentences are added following the word "court.":

> We limit our consideration to federal claims actionable under 42 U.S.C. @ 1983 for an alleged violation of the First and Fourth

> Amendments. State constitutional claims for injunctive and declaratory relief arising under Washington Constitution article I, section 5, are remanded to the Court of Appeals, Division One, for further appropriate proceedings.

3. The sentences and citation beginning with the words "The only" in the 13th line from the bottom of page 384 and ending with the number "551." in the 8th line from the bottom of page 384 are deleted, and the following sentence is inserted in their place:

> Pursuant to RAP 13.7(b), this case is remanded to the Court of Appeals to consider the availability of injunctive or declaratory relief under the state constitution and issues left unresolved in this opinion.

4. The paragraph beginning with the words "We affirm" in the 6th line from the bottom of page 384 and ending with the word "opinion." in the 2nd line from the top of page 385 are deleted, and the following paragraph is inserted in their place:

> We affirm the judgment of the Court of Appeals but on different grounds. We do not agree that warrants were required to make the arrests under the requirements of the federal constitution in this case. Nevertheless, because we find that a jury instruction was erroneous and misleading, and that the error was prejudicial to respondents, we reverse the trial court's judgment of dismissal and remand this case

to the Court of Appeals for further proceedings consistent with this opinion.

Dated this 5th day of December, 2001.

_____
Alexander, Chief Justice

APPROVED:

_____
Smith, J.

_____
Johnson, J.

_____
Madsen, J.

_____
Sanders, J.

_____
Ireland, J.

_____
Bridge, J.

_____
Guy, J.P.T.

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC., Plaintiffs, v. CITY OF SEATTLE, et al., Defendants.	66551-6 96-2-02226-8SEA

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 9, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

APPEARANCES:

FOR THE PLAINTIFFS: GILBERT LEVY
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ERMA DE MAR,
COURT REPORTER

AM I CORRECT?

A. YES.

Q. ARE YOU SAYING THAT BY IT'S SIMILAR, IT'S IDENTICAL?

A. NO, NOT IDENTICAL. ALL THE CLUBS ARE THE SAME. THEY HAVE LIKE TWO STAGES, THREE STAGES, THE WAY 'THE SEATING IS AND THE COUCH SECTION AND STUFF LIKE THAT.

Q. BUT OTHER THAN THE FACT THAT GENERICALLY 'THEY WILL HAVE SEATING AREAS, COUCH AREAS AND STAGES, 'THEY'RE NOT ALL IDENTICAL?

A. NO, THAT'S TRUE.

Q. YESTERDAY AFTERNOON, YOU SAID THAT YOU WOULD NOT PERMIT DIGITAL PENETRATION BY A DANCER, WHY IS THAT?

A. WELL, IT'S AGAINST THE ORDINANCE FOR ONE THING, AND I DON'T THINK IF IT IS, IT SHOULDN'T BE IN PUBLIC.

Q. WOULD YOU PERMIT A DANCER TO PINCH HER NIPPLES OR RUB HER NIPPLES?

A. NO.

Q. WHY NOT? IT'S AGAINST THE ORDINANCE?

A. I DON'T THINK IT'S RIGHT MYSELF.

Q. IS IT AGAINST THE ORDINANCE?

MR. LEVY: OBJECTION. CALLS FOR CONCLUSION.

THE COURT: OVERRULED. THE WITNESS'S STATE OF MIND IS RELEVANT.

Page 14

YOU MAY ANSWER THE QUESTION.

THE WITNESS: I'M TRYING TO THINK. I PERSONALLY DON'T THINK THERE IS ANYTHING WRONG WITH IT, IF SOMEBODY IS PINCHING THEIR NIPPLES OR TOUCHING THEIR NIPPLES, BECAUSE IT IS AN ADULT ENTERTAINMENT CLUB. I DON'T THINK THERE IS ANYTHING WRONG WITH IT.

MR. LARSON: COUNSEL, COULD YOU GIVE HIM A COPY OF HIS DEPOSITION, PLEASE?

MR. LEVY: MAY I APPROACH THE WITNESS?

THE COURT: CERTAINLY. THANK YOU.

Q. BY MR. LARSON: MR. FURFARO, DO YOU RECALL THAT AT SOME POINT IN TIME DURING THIS PROCEEDING, YOU AND I HAD A PRIOR CONVERSATION DURING THE COURSE OF THE DEPOSITION?

A. YES. UH-HUH.

Q. IT WAS TAKEN ON JUNE 2ND, 1997?

A. YES.

Q. HAVE YOU REVIEWED THE TRANSCRIPT THAT YOU HAVE IN YOUR HANDS BEFORE?

A. NO, I HAVEN'T.

Q. WOULD YOU TURN TO PAGE 18, PLEASE, THE NUMBERS ARE AT THE BOTTOM. WHEN YOU TESTIFIED ON THAT DAY, WERE YOU REPRESENTED BY COUNSEL?

A. YES.

Page 15

Q. MISS ORTEGA WAS WITH YOU? -

A. OH, YES. THE GIRL BACK THERE, YES.

Q. AND DO YOU RECALL THAT YOU WERE SWORN UNDER OATH?

A. UH-HUH.

Q. AND I DON'T MEAN TO BE INSULTING TO YOU, MR. FURFARO, BUT WERE YOU TELLING THE TRUTH WHEN YOU ANSWERED MY QUESTION THAT DAY?

A. YES. IN OTHER WORDS, THIS EVIDENTLY HAPPENED A YEAR AGO, TWO YEARS

AGO. I HAVE BEEN WATCHING THE STAGE A LITTLE CLOSER. THAT'S WHEN I NOTICED THE GIRLS DOING THEIR NIPPLES. NOT TOO OFTEN, ONE OR TWO, BUT AFTER WE WERE TALKING HERE.

Q. AND WHEN YOU SAW SOMEONE TOUCH THEIR NIPPLES, YOU WOULD CALL THEM TO THE BAR AND TOLD THEM TO KNOCK IT OFF, RIGHT?

A. YES. THAT'S AGAINST THE ORDINANCE. AND ACCORDING TO THE POLICE DEPARTMENT, THAT'S MASTURBATING.

Q. NOW, WOULD YOU TURN TO PAGE 19. YOU SEE WHERE THERE ARE NUMBERS DOWN THE SIDE OF THE PAGE?

A. UH-HUH.

Q. THOSE REFER TO THE LINE WHERE THE TEXT IS. YOU SEE THE QUESTION THAT BEGINS AT LINE 16?

A. YES, I'M READING IT. I'M TRYING TO THINK. WELL, SINCE ALL THIS INCIDENT HAPPENED, I

Page 16

HAVE BEEN WATCHING THE STAGES MUCH, MUCH CLOSER. AND IF I SAW ANY GIRL, LIKE I SAY, ACTUALLY REALLY RUBBING HER BREAST AND THINGS LIKE THAT, I CALL THEM TO THE BAR.

Q. HAVE YOU EVER TOLD THE DANCER BEFORE THEY DANCED, LOOK, WHOEVER, I DON'T WANT YOU RUBBING YOUR BREAST OR PINCHING YOUR. NIPPLES BECAUSE IT'S AGAINST THE LAW, WORDS TO THAT EFFECT?

A. NO. I TOLD THEM TO GO AHEAD AND READ THE ORDINANCE AND THAT EXPLAINS EVERYTHING TO THEM.

Q. SO WHAT APPEARS THEN IN THE ORDINANCE THAT SAYS THINGS YOU SHOULDN'T DO, THAT'S WHAT YOU INTENDED FOR THEM NOT TO DO?

A. YES.

Q. DO YOU REMEMBER THE DANCES THAT THE VARIOUS PERFORMERS WERE DOING ON NOVEMBER 20, 1995?

A. NO.

Q. DO YOU REMEMBER ANYTHING ABOUT ANY OF THEM?

A. NO.

Q. WERE YOU IN A POSITION, IN THE CLUB ON THE AFTERNOON OF NOVEMBER 20TH, 1995, TO SEE THE STAGES AND TO SEE THE DANCERS ON THE STAGES?

A. YES.

Q. THE CLUB WASN'T SO CROWDED THAT YOU COULDN'T SEE ANYTHING?

A. NO, IT WASN'T CROWDED. IT'S NOT CROWDED

* * *

DANCES?

A. YES. AT THE TIME, I CAN'T SAY EVERY DANCE I REMOVED ALL OF MY CLOTHING, BUT I AT LEAST MOVED MY TOP DURING EVERY DANCE PERFORMANCE I HAD ON THAT DAY.

Q. YOU SAID YOU TOUCHED YOURSELF ALL OVER YOUR BODY. C AN YOU DESCRIBE THAT IN MORE DETAIL?

A. YES. LIKE WHEN I WOULD TAKE OFF MY TOP, I WOULD – THIS WAS A FRONT TOP, SO IT WOULD UNDO IN THE FRONT. I WOULD TAKE OFF MY TOP AND I WOULD BE MOVING TO THE MUSIC. I WOULD PULL IT OFF AND I WOULD TAKE IT DOWN AND I WOULD TURN AND, YOU KNOW, THROW IT TO THE SIDE, OR GO TO THAT SIDE AND, WITH MY HANDS, I WOULD CARESS MY BODY WITH THE MUSIC. I WAS TOTALLY DANCING, ENJOYING MYSELF. I WOULD RUB MY LEGS, MY THIGHS. MY HAND WOULD GO ACROSS THE BOTTOM SIDE OF MY BUTT AND MY BACK. IT WAS ALL FLOWY. MY HANDS DID NOT TECHNICALLY JUST STAY IN ONE AREA. THEY WERE MOVING WITH THE MUSIC AS WELL AS MY BODY WAS.

Q. WAS THIS TOUCHING A PART OF THE REST OF YOUR DANCE?

A. OH, YES. I WAS TOTALLY WITH MY DANCE ROUTINE.

Q. DID YOU EVER MASTURBATE DURING --

A. NO. NO.

Q. -- THE STAGE PERFORMANCE?

Page 65

A. NO. THE TYPE OF DANCING I WAS DOING, THE TOUCHING OF MY BODY COULD NEVER ESCALATE, IN MY OPINION, UPON MYSELF, I WOULD HOPE. ALSO I WOULD NEVER ESCALATE TO THAT POINT.

Q. CAN YOU THINK OF -- OBVIOUSLY TRYING TO SHOW US WITH YOUR HANDS, CAN YOU THINK OF WORDS TO DESCRIBE THE WAY THAT YOU TOUCHED YOURSELF?

A. VERY SENSUAL, VERY SENSUAL, SEXY WAY. JUST MY AURA, I GUESS. IT WAS THE WAY I FELT.

Q. WAS THERE ANY PARTICULAR KIND OF MESSAGE OR MEANING TO YOUR DANCING ON STAGE?

A. YES. I WAS SEXY AND, YOU KNOW, THE PEOPLE OUT THERE, THEY WERE WATCHING ME THAT, YOU KNOW, HEY, I WOULD LIKE TO SPEND A FEW MINUTES WITH HER OR SOME TIME WITH HER. I WANTED THEM TO SEE ME AS A SEXY PERSON.

Q. DID TOUCHING YOURSELF CONTRIBUTE TO THAT MESSAGE?

A. WELL, DANCING, IN THE PROCESS OF TOUCHING MYSELF IN A DANCING WAY, YES.

Q. WHEN YOU TOOK DANCE CLASSES, DID ANY OF THE DANCE CLASSES THAT YOU TOOK INVOLVE TOUCHING PARTS OF YOUR BODY?

A. YES. BALLET YOU TOUCHED YOUR LEGS AND YOU WOULD GO UP. YOU WOULD TOUCH YOUR -- YOU WOULD TOUCH YOUR BREAST. CLOTHES ON OR OFF, YOU WOULD TOUCH YOUR BREAST.

Page 66

AND DANCE CLOTHES IS REALLY THIN TOO, YOU KNOW. IT'S NOT LIKE IT'S BULKY MATERIAL. THE SAME THING WITH JAZZ TOO, MODERN DANCE, YOU DO A LOT OF -- YOU TOUCH YOURSELF IN CERTAIN AREAS BECAUSE THAT'S JUST THE WAY THE BEAT IS AND THE WAY A LOT OF PERFORMANCE WOULD GO.

Q. ON THAT DATE, NOVEMBER 20TH, 1995, DID YOU DANCE THE WAY YOU HAVE JUST DESCRIBED?

A. YES.

Q. ON THAT DAY, DID YOU HAVE AN UNDERSTANDING IF THERE WERE RULES OF WHAT YOU COULD OR COULD NOT DO IN STAGE PERFORMANCE?

A. YEAH. I KNEW THAT IT WAS OKAY TO TOUCH MY BODY, YOU KNOW, AS LONG AS IT WAS DURING A DANCE ROUTINE, AND NOT BE OBSCENE OR CRUDE AND SIT UP THERE AND MAKE GESTURES THAT I'M JUST -- EXCUSE ME -- MASTURBATING ON STAGE OR ANYTHING LIKE THAT. JUST AS LONG AS I WAS DANCING, PERFORMING, I COULD PUT MY HANDS WHEREVER. I MEAN I COULD PRESS MY BODY.

Q. WERE THE RULES THE SAME OR DIFFERENT FOR STAGE AND TABLE DANCES?

A. THE RULES ARE DIFFERENT FOR TABLE DANCES. DID YOU WANT ME TO EXPLAIN THE DIFFERENCE?

Q. NO. I WANT TO ASK YOU A FEW MORE QUESTIONS ABOUT THE OFFICERS. YOU SAID THE OFFICERS ARRIVED. CAN

Page 67

YOU DESCRIBE THE SERIES OF EVENTS THAT HAPPENED?

A. WHEN OFFICERS ARRIVED, I -- EVEN THOUGH I WAS KIND OF AFRAID, IN THE BEGINNING, VERY, VERY BEGINNING, OF COURSE, EVERYBODY -- THEY TELL YOU TO GO SIT DOWN AND STUFF. I WAS KIND OF AFRAID. BUT I KNEW I DIDN'T DO ANYTHING WRONG. I DIDN'T DO ANY DIRTY DANCES THAT DAY. I ONLY DANCED WITH ONE PATRON AND I KNEW HE WASN'T AN OFFICER, SO I COULDN'T BE IN ANY KIND OF

TROUBLE. IN MY MIND I WAS A LITTLE UPSET. I WASN'T THINKING THEY'D ARREST ME.

WHEN WE GOT PUT ON THE BENCH, I WAS SITTING THERE WITH, I THINK, 17 OTHER GIRLS. AND THEN AN OFFICER SAID, YOU, YOU, YOU AND YOU, I BELIEVE, CAN GO SIT OVER THERE. AND THERE WERE OTHER DANCERS, BUT THEY HADN'T BEEN ON STAGE YET.

SO THEY STARTED CALLING OUT. THEY SAID, YOU ALL ARE UNDER ARREST. THEY DIDN'T SAY WHY WE WERE UNDER ARREST.

THAT KIND OF PANICKED ME. I WANTED TO KNOW WHY I WAS UNDER ARREST. THEY WEREN'T GOING TO TELL US. SOMEBODY HAD ASKED AND NOBODY HAD SAID ANYTHING. THEY JUST ACTED LIKE THEY DIDN'T HEAR.

THEN I WAS THE FIRST ONE OVER ON THE LIST. THEY CALLED MY NAME. THEY TOLD ME THAT I HAD TO GO OVER TO A CERTAIN AREA TO GET PICTURES TAKEN OF ME. AND THEY

* * *

AND CHARMING AND A LOVELY PERSON AND HAPPY WITHOUT PRETENDING TO MASTURBATE?

A. YEAH. I WOULD ASSUME THAT YOU COULD. I DID.

Q. IS MASTURBATION, IN YOUR UNDERSTANDING, SOMETHING THAT'S FORBIDDEN BY THE ORDINANCE?

A. YES.

Q. S SIMULATED MASTURBATION FORBIDDEN BY THE ORDINANCE?

MS. ORTEGA: OBJECTION. THAT CALLS FOR A CONCLUSION OF LAW.

THE COURT: I WILL PERMIT THIS WITNESS TO ANSWER, NOT BECAUSE SHE IS STATING THE LAW, BUT HER MENTAL STATE, WHAT SHE THINKS THE LAW IS RELEVANT.

DO YOU HAVE THE QUESTION IN MIND?

THE WITNESS: YEAH. BUT I DON'T UNDERSTAND WHAT YOU MEAN BY SIMULATING MASTURBATION, WHAT IS THAT?

Q. BY MR. LARSON: PRETENDING TO MASTURBATE?

A. I'M LOST HERE. YOU WANT ME TO SAY WHAT ABOUT PRETENDING MASTURBATION, DO I THINK IT'S OKAY, DO I NOT THINK IT'S OKAY? WHAT?

Q. THAT'S CORRECT. YOU HAVE GOT IT.

A. I NEVER THOUGHT OF ANYTHING THAT I WAS DOING ON THE STAGE EVEN TO BE CONSIDERED ANY TYPE OF MASTURBATION OF ANY SORT, BEING SIMULATED OR ANYTHING.

Page 106

SO I GUESS I CAN'T ANSWER THAT.

Q. DID YOU EVER READ THE ORDINANCE?

A. YES, I DID.

Q. DID YOU READ THE LANGUAGE IN THERE THAT SAYS THAT NO EMPLOYEE OR ENTERTAINER SHALL PERFORM ACTS OF OR ACTS WHICH SIMULATE, THEN THERE IS A LIST OF ACTS?

MR. LEVY: YOUR HONOR, I OBJECT. THAT'S MISCHARACTERIZATION OF THE ORDINANCE. IF HE'S GOING TO READ THE ORDINANCE, HE OUGHT TO READ THE WHOLE THING, ALL OF IT.

THE COURT: WELL, I WILL SUSTAIN THE OBJECTION. I GUESS I WOULD PREFER THAT YOU HAND HER THE ORDINANCE RATHER THAN JUST PARAPHRASING IT. IF YOU WANT TO JUST HAND HER THE NOTEBOOK OR --

MR. LARSON: WELL, YOUR HONOR, I DIDN'T PARAPHRASE IT.

THE COURT: BUT I'M JUST SAYING YOU READ PART OF IT.

MR. LARSON: SURE IT IS. I WAS ONLY ASKING ABOUT THE FIRST PART.

THE COURT: RIGHT.

Q. BY MR. LARSON: YOU SEE DOWN THERE WHERE IT SAYS SUB-PARAGRAPH 2 --

OH, BEFORE I ASK THAT, YOUR HONOR, ARE WE STILL GOING BY THE RULE THAT ONLY ONE COUNSEL PER

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC.,	)	
Plaintiffs,	)	66551-6 96-2-02226-8SEA
v.	)	
CITY OF SEATTLE, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 10, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

APPEARANCES:

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ERMA DE MAR,
LADD SUTHERLAND,
COURT REPORTERS

Q. BY MR. LEVY: MISS SILVA, DO YOU RECALL MR. LARSON SHOWING YOU YOUR DEPOSITION AND YOUR ANSWER TO THE DEPOSITION WHERE YOU HAD TOLD HIM THAT YOU DIDN'T KNOW WHETHER OR NOT YOU MASSAGED YOUR VAGINA? DO YOU RECALL THAT LINE OF QUESTIONING BY MR. LARSON?

A. YES.

Q. WHEN HE ASKED YOU THAT QUESTION, DID YOU UNDERSTAND WHAT HE MEANT BY THE TERM "MASSAGE"?

A. NO. WHEN I THINK ABOUT THE WORD "MASSAGE," I THINK ABOUT LIKE TO MASSAGE A GUY AND YOU'RE LIKE GOING LIKE THAT. (MAKING MOTIONS)

Q. WELL, WHEN YOU DID YOUR DANCE ROUTINE ON NOVEMBER 20TH, 1995 OR BEFORE THEN, DO YOU RECALL EVER CONSISTENTLY RUBBING YOURSELF IN THAT AREA OF YOUR BODY WHILE YOU DANCED?

A. NO.

Q. DID YOU DO THAT?

A. AS I SAID BEFORE, I WOULD PUT MY HAND THERE COVERING IT. I NEVER FELT I GROPED MYSELF. I DID PUT MY HAND THERE AS IF I WAS COVERING MYSELF.

Q. COUNSEL EXPLORED WITH YOU OR MENTIONED THE COMMUNITY SERVICE AWARD THAT YOU GOT, DO YOU RECALL THAT?

A. YES.

Q. WHAT DID YOU GET THE AWARD FOR?

A. IT WASN'T AS -- IT WAS AN ACADEMIC

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC.,	)	
Plaintiffs,	)	66551-6 96-2-02226-8SEA
v.	)	
CITY OF SEATTLE, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 11, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

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ERMA DE MAR,
COURT REPORTER

SEATTLE, WASHINGTON;
THURSDAY, DECEMBER 11, 1997;
9:17 A.M.

-000-

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

MR. LEVY: GOOD MORNING, YOUR HONOR, AGAIN AT THIS TIME I PROPOSE TO ATTEMPT TO PLAY THE TAPE.

(THE AUDIO TAPE WAS PLAYED.)

KENNETH SWANSON, +

THE WITNESS ON THE STAND AT THE TIME OF THE ADJOURNMENT, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION + (RESUMED)

BY MR. LEVY:

Q. DETECTIVE SWANSON, DO YOU RECOGNIZE THE AUDIO TAPE I HAVE JUST PLAYED?

A. YES.

Q. AND IS THAT AN ACCURATE RENDITION OF THE AUDIO TAPE THAT YOU MADE WHEN YOU WENT INTO RICK'S NIGHTCLUB ON NOVEMBER 20TH, 1995?

A. YES, IT IS.

Page 2

Q. HOW LONG WOULD YOU ESTIMATE THE TAPE WAS, THE RECORD THAT WE HAVE JUST HEARD? TEN MINUTES?

A. SOMETHING LIKE THAT, PROBABLY 10, 15 MINUTES. I WASN'T WATCHING THE TIME.

Q. AND THE LENGTH OF TIME THAT YOU WERE IN THE BUSINESS WAS ROUGHLY 40 MINUTES?

A. THAT'S ABOUT RIGHT.

Q. AND IN TERMS OF THE OBSERVATIONS THAT YOU RECORDED FOR EACH INDIVIDUAL ENTERTAINER, WOULD THAT HAVE BEEN MAYBE 45 SECONDS WORTH OF OBSERVATION PER PERSON ROUGHLY?

A. YEAH. I SUPPOSE AVERAGE, YEAH.

Q. NOW, I HEARD -- AND CORRECT ME IF I'M MISTAKEN -- I HEARD SOUNDS, AUDIBLE SOUNDS ON THE TAPE INDICATING THAT YOU WERE TURNING THE TAPE RECORDER ON AND OFF; IS THAT CORRECT?

A. THAT'S RIGHT.

Q. NOW, IF WE COULD, PLEASE, DO YOU RECALL -- WOULD YOU TAKE A LOOK AT 4 IN YOUR

BOOK THERE, PLEASE. EXCUSE ME, I'M SORRY. WOULD YOU LOOK AT ITEM NUMBER 5?

A. YES. I HAVE IT.

Q. AND IS ITEM NUMBER 5, IS THAT THE TRANSCRIPT THAT WE WERE TALKING ABOUT YESTERDAY?

A. YES, IT IS.

Q. NOW, THE FIRST ENTRY ON ITEM NUMBER 5 WHERE

Page 3

IT MAKES REFERENCE TO AN ENTERTAINER BY THE NAME OF GABRIELLE, DID YOU LATER LEARN THAT THAT PERSON WAS THE PLAINTIFF IN THIS CASE, BRANDY KIDDER?

A. YES.

Q. AND AT THE BOTTOM OF PAGE 1 WHERE IT MAKES REFERENCE TO "JESSIE, HISPANIC, FEMALE, LONG, BLACK HAIR," IS THAT THE REFERENCE TO THE PLAINTIFF IN THIS CASE, ESSIE SILVA?

A. YES.

Q. WOULD YOU TURN TO PAGE 3 OF THE TRANSCRIPT WHERE REFERENCE IS MADE TO AN INDIVIDUAL BY THE NAME OF CHANEL?

A. YES.

Q. DO YOU UNDERSTAND THAT THE PERSON THAT YOU REFERRED TO IN THE TAPE AS CHANEL IS AN INDIVIDUAL BY THE NAME OF DARCY POOLE?

A. I BELIEVE THAT'S CORRECT, YES.

Q. DO YOU RECALL MISS POOLE?

A. YES.

Q. DID YOU MAKE ANY OBSERVATIONS OF THE PERFORMANCE OF MISS POOLE OTHER THAN THAT WHICH YOU RECORDED ON THE AUDIO TAPE?

A. I'M NOT SURE I UNDERSTAND WHAT YOU MEAN.

Q. WELL, I'D LIKE YOU TO THINK BACK NOW TO THE FATEFUL DAY OF NOVEMBER 20TH, 1995, AND I'M GOING TO ASK

* * *

ANOTHER INDIVIDUAL THAT YOU OBSERVED?

A. YES.

Q. AND WAS SHE DANCING?

A. SHE WAS.

Q. AND WAS THE TOUCHING PART OF HER PERFORMANCE?

A. YES, IT WAS.

Q. SARA LYONS?

A. YES.

Q. SHE WAS DANCING?

A. SHE WAS.

Q. AND THE TOUCHING WAS PART OF HER PERFORMANCE?

A. YES, IT WAS.

Q. WAS THERE ANY INDIVIDUAL IN THIS GROUP THAT WAS NOT DANCING?

A. NO.

Q. WAS THERE ANY INDIVIDUAL IN THIS GROUP THAT YOU OBSERVED WHO TOUCHED HERSELF AND THE TOUCHING WAS NOT PART OF THE PERFORMANCE?

A. I'M NOT SURE -- NO. IT WAS -- ALL THE ACTIONS THAT I DESCRIBED ON THE TAPE TOOK PLACE DURING THE INDIVIDUAL PERFORMANCE.

Q. TOOK PLACE WHILE THEY WERE DANCING?

A. YES.

Page 11

MR. LEVY: NO FURTHER QUESTIONS.

THANK YOU, SIR.

CROSS-EXAMINATION +

BY MR. LARSON:

Q. DETECTIVE SWANSON, WAS NOVEMBER 20TH OF 1995 THE FIRST TIME YOU HAD EVER BEEN IN RICK'S?

A. NO.

Q. CAN YOU TELL THE JURORS WHAT OTHER CLUBS IN THE CITY OF SEATTLE YOU HAVE BEEN INTO PRIOR TO NOVEMBER 20, 1995?

A. ASIDE FROM RICK'S?

Q. YES.

A. THE DEJA VU, THE SANDS, G CENTERFOLD, RAZZMATAZ, THE DANCING BEAR. I BELIEVE THAT'S IT.

Q. ROUGHLY PRIOR TO -- I'M GOING TO GET MY DATES ALL MIXED UP.

ROUGHLY, HOW MANY TIMES HAD YOU BEEN IN RICK'S AND OBSERVED ENTERTAINERS PERFORM PRIOR TO NOVEMBER 20, 1995?

A. FIFTY TO SEVENTY TIMES.

Q. DURING THE COURSE OF THAT PERIOD OF TIME, DETECTIVE SWANSON, CAN YOU TELL THE JURORS WHETHER OR NOT YOU HAVE EVER OBSERVED A STAGE DANCE DURING ANY OF THOSE

PERFORMANCES – DURING ANY OF THOSE TIMES THAT YOU HAVE BEEN IN RICK'S?

A. YES, I HAVE.

Q. PRIOR TO NOVEMBER 20TH, 1995?

A. YES.

Q. ROUGHLY HOW MANY DANCES WOULD YOU SAY YOU HAVE OBSERVED IN THAT PERIOD OF TIME PRIOR TO NOVEMBER 20TH, 1995?

A. SPECIFICALLY AT RICK'S?

Q. YES.

A. PROBABLY A HUNDRED PLUS, 120, 125.

Q. IN THE COURSE OF OBSERVING THOSE OCCASIONS, DETECTIVE SWANSON, CAN YOU TELL THE JURORS WHETHER OR NOT YOU HAVE EVER SEEN A DANCER MASSAGE HER BREASTS?

MR. LEVY: OBJECTION. FOUNDATION, RELEVANCE.

THE COURT: OVERRULED.

THE WITNESS: YES, I HAVE.

Q. BY MR. LARSON: NOW, WOULD YOU DESCRIBE FOR THE JURORS WHAT YOUR DEFINITION OF MASSAGING A BREAST IS?

A. SPECIFICALLY, WHAT I WAS REFERRING TO WAS GRABBING THE BREAST AND SQUEEZING, MANIPULATING WITH THE HAND.

Q. IN YOUR DEMONSTRATION, ARE YOU CONTRACTING YOUR FINGERS?

Page 13

A. YES.

Q. IN THE TAPE THAT WE LISTENED TO AND IN THE TRANSCRIPTION WHICH IS EXHIBIT NO. 5, THERE ARE SOME REFERENCES TO MASSAGING OF BREASTS. IS THAT WHAT YOU ARE REFERRING TO WHEN YOU SAY MASSAGING BREASTS IN THAT TAPE, WHAT YOU HAVE JUST TALKED ABOUT HERE?

A. YES.

Q. IN THAT TRANSCRIPT AND IN THE TAPE WE HEARD, CAN YOU TELL US HOW MANY OBSERVATIONS YOU HAVE ON THAT TAPE RECORDING THE DANCER GABRIELLE?

A. I HAVE TWO.

Q. AND LET ME JUST ASK YOU THIS, SIR. WHEN YOU OBSERVED THE DANCERS ON NOVEMBER 20TH, 1995, WHERE WERE YOU?

A. I WAS SITTING AT A TABLE APPROXIMATELY 10 TO 15 FEET AWAY FROM THE MAIN STAGE. I WAS SITTING PRETTY MUCH CENTER OF THE STAGE.

Q. WAS THERE ANYTHING THAT YOU CAN RECALL THAT WOULD HAVE OBSTRUCTED YOUR VIEW OF WHOEVER WAS ON THE STAGE?

A. NOTHING.

Q. THE RECORDER THAT WE HEARD THE TAPE FROM, WOULD YOU DESCRIBE WHAT THAT WAS, PLEASE.

A. IT WAS A SMALL TAPE RECORDER THAT WAS SET UP WITH A REMOTE CONTROL -- NOT A REMOTE CONTROL, BUT AN ON-OFF SWITCH WHICH WAS TAPED TO MY HAND, AND A

MICROPHONE WHICH WAS -- ONE WAS TAPED TO MY WRIST, THE OTHER WAS TAPED TO MY CHEST.

Q. NOW, WHEN YOU TALK AND YOUR VOICE IS RECORDED ON THE TAPE, DID YOU HAVE TO DO ANYTHING SPECIFIC? I MEAN DID YOU HAVE TO MUMBLE INTO YOUR HAND? WHAT DID YOU HAVE TO DO?

A. I WOULD TALK TOWARDS MY HAND. I WOULD PUT MY HAND UP AND JUST TALK AT MY WRIST.

Q. CAN YOU TELL US, WITH REGARD TO THE DANCER, DARCY POOLE -- YOU WERE NOT HERE YESTERDAY WHEN SHE WAS HERE -- BUT HAVE YOU EVER SEEN A VIDEOTAPE OF DARCY POOLE DANCING?

A. YES, I HAVE.

Q. WHEN DID YOU SEE THAT TAPE LAST?

A. I VIEWED THAT TAPE, I GUESS, PROBABLY ABOUT A YEAR AND A HALF AGO, DURING A COURT HEARING.

Q. AND DID YOU VIEW THAT TAPE LAST WEEK AT MY REQUEST?

A. OH, YES, I'M SORRY. YES, I DID.

Q. NOW, THE DANCE DEPICTED IN THAT TAPE, DETECTIVE SWANSON, CAN YOU TELL US WHETHER OR NOT THERE IS ANY DIFFERENCE IN WHAT'S DEPICTED ON THAT VIDEOTAPE FROM THE DANCE YOU SAW MS. POOLE PERFORMED ON NOVEMBER 20, 1995?

A. THERE ARE DIFFERENCES.

Page 15

Q. WOULD YOU DESCRIBE FOR THE JURY, PLEASE, WHAT THE DIFFERENCES ARE?

A. THE MAJOR DIFFERENCE IS THAT THE DANCE THAT I VIEWED ON THE VIDEOTAPE DOES NOT CONTAIN ANY OF THE VIOLATIONS THAT I SAW ON NOVEMBER 20TH.

Q. I WANT TO HAND YOU TWO EXHIBITS. I WILL GIVE YOU THE BOOK, BUT I --

A. I HAVE A BOOK HERE.

Q. YOU HAVE A BOOK. OKAY, GOOD. THE FIRST IS TAB NUMBER 5. AND MR. LEVY ASKED YOU IF YOU UNDERSTOOD THE DANCER IDENTIFIED AS CHANEL IS MISS POOLE, AND I THINK HE HAS ESTABLISHED THAT ON PAGE 3. DO YOU SEE THE ENTRY FOR CHANEL?

A. YES, I DO.

Q. CAN YOU TELL THE JURORS WHETHER OR NOT THERE WERE ANY OBSERVATIONS MADE THAT APPEAR THERE THAT WERE VIOLATIONS OF THE ORDINANCE?

A. YES, THERE ARE SEVERAL LISTED.

Q. WHAT ARE THEY, SIR?

A. THAT SHE MASSAGED HER BUTTOCKS; THAT SHE MASSAGED HER VAGINA, I THINK THREE TIMES IT'S LISTED HERE; THAT SHE MASSAGED HER BREASTS; AND THAT SHE PINCHED HER NIPPLES.

Q. I'M NOT GOING TO BE VERY GOOD AT THIS, DETECTIVE SWANSON. IF I PUT MY HAND OVER MY GENITAL

Page 16

AREA, IS THAT MASSAGING THE VAGINA, ASSUMING THAT I HAVE ONE?

A. WELL, NO. IN ANY CASE IT WOULD NOT BE.

Q. NOW, THIS IS GOING TO TAKE A REAL LEAP OF FAITH HERE. ASSUMING I'M ON THE STAGE AND I HAVE GOT ON A PAIR OF, WHAT WERE THEY, BRIGHT PINK PANTIES OR SOMETHING, AND IF I START TO LOWER THEM AND GO LIKE THAT, IS THAT MASSAGING THE VAGINA?

A. NO, IT ISN'T.

Q. WHEN YOU SAY "MASSAGING THE VAGINA," CAN YOU TELL US WHETHER OR NOT YOU OBSERVED ACTUAL TOUCHING OF THE VAGINAL AREA?

A. ABSOLUTELY, YES.

Q. WITH WHAT PART OF MISS POOLE'S BODY?

A. WITH PRIMARILY THE FINGERS, BUT THE HAND AND FINGERS.

Q. AT THE TIME YOU OBSERVED HER DO THAT, WAS IT A FLEETING GLANCE? HOW WOULD YOU DESCRIBE WHAT HAPPENED?

A. IT WAS NOT FLEETING. WHAT HAPPENED WAS THAT SHE REACHED DOWN TO THAT AREA AND THERE WAS A RUBBING UP AND DOWN WHICH LASTED, AS I SAID EARLIER, TWO TO THREE SECONDS.

Q. WHAT WAS SHE DOING WHEN SHE DID THAT? WHAT WAS HER BODY EXPRESSION?

A. HER BODY EXPRESSION?

Page 17

Q. SURE.

MR. LEVY: OBJECTION. VAGUE AND AMBIGUOUS.

THE COURT: SUSTAINED.

Q. BY MR. LARSON: WOULD YOU LOOK AT -- I'VE GOT TO FIND THE TAB NUMBER HERE -- TAB 3, PAGE 4?

A. YES, I HAVE IT HERE.

Q. LINE 17?

A. LINE 17, YES.

Q. WHEN YOU OBSERVED HER MASSAGING HER VAGINA AREA, WHAT WAS HER BODY LANGUAGE, I GUESS, IS A BETTER WAY OF ASKING IT. IF YOU KNOW.

MR. LEVY: OBJECTION. LACK OF FOUNDATION.

THE COURT: OVERRULED.

THE WITNESS: AS I RECALL, SHE HAD -- HER EYES WERE -- I DON'T KNOW IF HER EYES WERE CLOSED OR NOT. SHE HAD HER LEGS SPREAD. SHE WAS MASSAGING UP AND DOWN, KIND OF A HINT OF A SMILE ON HER FACE. IT RESEMBLED MASTURBATION.

Q. BY MR. LARSON: WHEN YOU MADE OBSERVATIONS THAT ARE RECORDED IN EXHIBIT 5 WITH REGARD TO PINCHING HER NIPPLES, WHAT CONDUCT ARE YOU DESCRIBING THERE?

A. WHAT I'M TALKING ABOUT IS GRABBING THE NIPPLE BETWEEN THE THUMB AND FINGER AND SQUEEZING AND MOVING THE FINGERS KIND OF UP AND DOWN, CIRCULAR KIND OF MOTION.

Page 18

Q. NOW, ARE YOU DESCRIBING MOVING THE WHOLE BREAST OR ARE WE JUST NARROWLY CONFINED TO THE NIPPLES THEMSELVES?

A. SPECIFICALLY THE NIPPLES.

Q. WHEN YOU MADE OBSERVATIONS OF ANY OF THE PERFORMERS OR ANY OF THE VIOLATIONS THAT YOU MADE OBSERVATIONS TO, WERE YOU INCLUDING IN THOSE OBSERVATIONS INCIDENTAL CONTACT, INCIDENTAL TOUCHING?

A. NO.

Q. FOR INSTANCE -- AND AGAIN THIS IS ANOTHER LEAP OF FAITH HERE BECAUSE I DON'T RESEMBLE -- BUT IF A DANCER TAKES OFF THE TOP AND GOES LIKE THAT AND SQUEEZES THE BREAST WITH THE ARMS, ANY OBSERVATION OF THAT, DID YOU INCLUDE IT AS A VIOLATION?

A. I SAW THAT, I DID NOT INCLUDE THAT AS A VIOLATION.

Q. IN THE COURSE OF, SAY, REMOVING A TOP AND BRUSHING THE BREAST WITH THE HANDS OR TOUCHING THE BREAST WITH THE HANDS, REMOVING IT, IS THAT SOMETHING THAT YOU RECORDED AS A VIOLATION?

A. ONCE AGAIN WHILE I DID OBSERVE THAT, I DID NOT RECORD IT AS A VIOLATION.

Q. IN THE TAPE OF MISS POOLE THAT YOU SAW THE OTHER DAY, DID YOU SEE ANYWHERE IN THAT TAPE MISS POOLE MASSAGING HER BREASTS?

Page 19

A. NO.

Q. DID YOU SEE ANYWHERE IN THAT TAPE MISS POOLE PINCHING HER NIPPLES?

A. NO.

Q. DID YOU SEE ANYWHERE IN THAT TAPE MISS POOLE MASSAGING HER VAGINA?

A. NO, I DID NOT.

Q. OR RUBBING IT IN THE WAY YOU DEMONSTRATED FOR THE JURY?

A. NO.

Q. DID YOU SEE ANYWHERE IN THAT TAPE MISS POOLE MASSAGING HER BUTTOCKS?

A. NO.

Q. WHAT DO YOU SEE THE DANCER GABRIELLE DO THAT WAS IN VIOLATION OF THE ORDINANCE?

A. I SAW HER TOUCH HER ANUS WITH HER FINGER AND SHE GRABBED HER BUTTOCKS. SHE MASSAGED HER BREASTS AND SHE ALSO, I BELIEVE, IN THE SECOND PERFORMANCE, SHE ALSO RUBBED, MASSAGED HER VAGINA.

Q. WERE ANY OF THOSE TOUCHINGS THAT YOU HAVE DESCRIBED MOMENTARY OR FLEETING TOUCHES?

A. NO. AS I SAID EARLIER, THEY ALL APPEARED TO BE DELIBERATE AND THE TOUCHING WAS SUSTAINED FOR A COUPLE OR THREE SECONDS.

Q. IN THE BOOK THERE, DETECTIVE, UNDER TABS 31

Page 20

AND 32, THERE ARE TWO PHOTOGRAPHS. AND I WILL ASK IF YOU RECOGNIZE WHO'S DEPICTED IN THOSE PHOTOGRAPHS?

A. 31 IS THE DANCER, STAGE NAME GABRIELLE, WHO IS BRANDY KIDDER, AND AS IS 32.

Q. NOW, IN EXHIBIT 5 DOWN AT THE BOTTOM OF PAGE 1, IT REFERS TO -- ACTUALLY IT REFERS TO A JESSIE?

A. YES.

Q. NOW, DID YOU SAY "JESSIE" ON THE TAPE?

A. I THINK I SAID "ESSIE" ON THE TAPE.

Q. CAN YOU TELL US WHETHER OR NOT YOU MADE ANY OBSERVATIONS OF ANY VIOLATIONS OF THE ORDINANCE BY ESSIE, HISPANIC FEMALE?

A. YES, I DID.

Q. WHAT DID YOU OBSERVE THAT WAS IN VIOLATION?

A. I OBSERVED HER ONCE AGAIN MASSAGING HER BREASTS. SHE MASSAGED HER VAGINA SEVERAL TIMES, PINCHED HER NIPPLES. I THINK THERE WERE TWO INSTANCES WHERE SHE PINCHED HER NIPPLES. AND SHE RUBBED HER VAGINA AT LEAST THREE TIMES, AND I THINK IT'S ENUMERATED HERE. I BELIEVE IT IS THREE TIMES.

Q. AGAIN, DETECTIVE, ON THESE OCCASIONS THAT YOU HAVE ENUMERATED AS TO THE DANCER ESSIE, WERE ANY OF THE ITEMS THAT – THE VIOLATIONS THAT YOU LISTED MOMENTARY OR FLEETING OR INCIDENTAL TOUCHING?

A. NO, THEY WEREN'T.

SWANSON TAPE

Detective Swanson (unintelligible) 20 hours

INSPECTION OF CLUB RICK'S

Gabrielle on the main stage black sparkling string bikini. She touched her anus, buttocks, massaged her breasts. Gabrielle has long brown hair, slightly on the heavy side.

Silver is on the main stage. She is wearing white t-bar panties, white silky top. She has short blonde hair and a tattoo on her left upper arm and one on her left calf. She just massaged her breasts, pinched her nipples and is now massaging her vagina.

Kathy on the main stage has long brown hair. She's wearing a one-piece black teddy and thigh—high black stockings, black stiletto heels. Kathy there is no violations, no violations.

Stacey on the main stage. Pink bikini with white polka-dots, shoulder-length blonde hair and pink stiletto heels. Stacey just massaged her anus and vagina and is now massaging her breasts, just pinched her nipples and again massaging her vagina.

Lace is on the main stage. White female, shoulder-length light brown hair. She's wearing a pink bikini. She just rubbed her vagina and she just massaged her vagina and rubbed her breasts.

Jessie on the main stage. A Hispanic female, long black hair wearing a black lace bra and a matching black lace t-bar and white stiletto heels. Jessie is massaging her

breasts and massaging her vagina. Again massaging her breasts, pinching her nipples; she just massaged her vagina, again massaging her breasts, pinching her nipples. She again massaged her vagina.

Sasha

(Female voice): Want a dance?

(Male voice): No, thank you.

Sasha on the main stage. Shoulder-length blonde hair. Wearing a one-piece string-type outfit with very narrow, partially covering her breasts, g-string type back to it. Wearing white stiletto heels. Sasha just massaged her breasts and her vagina, again massaging her vagina, rubbing her breasts.

Alex on the main stage. Shoulder-length curly brown hair, tattoo on her left buttocks. She's wearing a black g-string and a matching black bra. Alex just massaged her breasts, is now then is massaging her vagina.

Julie is taking the main stage. She's got long brown hair, light brown hair about to the middle of her back, wearing a white bra and matching lace panties; also wearing red stiletto heels and long dangling gold earrings. She is massaging her vagina, massaging her breasts, squeezing her nipples. Again, rubbing her breasts, squeezing her nipples and rubbing her vagina.

Tammy on the main stage. Short brown hair, wearing a pink bikini with sort of like blue or green polka-dots on it. She's also wearing black stiletto heels and gold hoop-type earrings. She also has a pierced

vagina, wearing a, it looks like a gold earring in her vagina. Now she just rubbed her buttocks, touched her anus she's massaging her breasts, kissing her nipples.

Safasha on the main stage. Long dark brown hair. Black t-bar with little silver conchos on it and black halter top. She's wearing a leather band on her right wrist and black stiletto heels. Okay, she's massaging her breasts.

Disregard that last one. I don't know what her stage name is. Got a Safasha coming up to the center stage now wearing a white bra matching white t-bar, black stiletto heels. Okay, she's massaging her vagina, rubbing her breasts, rubbing her breasts, pinching her nipples and massaging her vagina.

Okay, that gal that I couldn't identify – I believe her name is Jazz.

Okay, Michelle on the main stage. Black one-piece teddy-type outfit. Gold platform stiletto heels, long brown hair. She's wearing some type of gold locket around her neck. She's massaging her breasts, touching her nipples. Again, massaging her breasts, pinching her nipples.

That was Jasmine that was on stage. Jasmine. Jasmine.

Chanel is now taking the main stage. Chanel has short blonde hair, is wearing a looks like a hot-pink t-bar, matching bikini top. She has hot pink stiletto heels. She's massaging her buttocks, massaged her vagina and again rubbing her vagina, massaging her breasts, pinching her nipples, just rubbed her vagina, just rubbed her buttocks and massaged her vagina.

I think we've come around full circle. Gabrielle is back up on stage. She just touched her vagina again, rubbing her breasts, and (unintelligible).

Okay, Kathy, who has no violation in the first go-round just touched her vagina and her buttocks.

The time is now 1426 hours. I have just left club Rick's and am going back to my car. This concludes this operation.

Supreme Court U.S.
FILED
APR 10 2002
OFFICE OF THE CLERK

No. 01-1316

In The

Supreme Court of the United States

CITY OF SEATTLE,

Petitioner,

v.

NICK FURFARO; BRANDY KIDDER; ESMERALDA SILVA; AND JJR, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

CONSTITUTIONAL PROVISIONS AND STATUTES... 1

STATEMENT OF THE CASE..... 3

REASONS FOR DENYING THE WRIT 8

A. When Petitioner's Mischaracterizations Of The Record And The Holding Of The Washington Supreme Court Are Corrected, It Is Clear That Neither Of The Questions Presented In The Petition Are Worthy Of Review 9

B. This Court Lacks Jurisdiction To Grant The Petition Because the Judgment Isn't Final..... 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 879 (1949) 11

City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed.2d 265 (2000) 12

Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S. Ct. 1079, 43 L. Ed.2d 328 (1975) ..... *passim*

Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed.2d 824 (1979). 11

Jefferson v. City of Tarrant, 522 U.S. 75, 118 S. Ct. 421, 139 L. Ed.2d 433 (1997). 16, 18

Miller v. California, 413 U.S. 15, 93 S. Ct. 2007, 37 L. Ed.2d 419 (1973).....10, 11

O'Day v. King County, 109 Wn.2d 796, 749 P. 2d 142 (1988) 9, 10, 11, 13

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed.2d 569 (1945)..... 16

STATUTES AND RULES

Article I, § 5 of the Washington Constitution..... 1

Article I, § 7 of the Washington Constitution..... 1

Seattle Municipal Code § 6.270.100.....1, 3, 5, 9

Title 28 United States Code § 1257(a) 1, 16

Title 42 United States Code § 1983.....6, 7

Washington Rule of Appellate Procedure 4.2(a)(4) 6

Washington Rule of Appellate Procedure 4.2(e)..... 6

Washington Rule of Appellate Procedure 12.5(a)..... 15

Washington Rule of Appellate Procedure 13.7(b)..... 7

APPENDIX

Rep.Tr., Dec. 9, 1997, pp. 52, 63-65 (Witness Kidder) ..... App. 1

Rep.Tr., Dec. 9, 1997, pp. 126, 131-134 (Witness Silva) ..... App. 5

Rep.Tr., Dec. 11, 1997, pp. 1-11 (Witness Swanson) ..... App. 10

Rep.Tr., Dec. 15, 1997, pp. 31-33 (Witness Oliver) ..... App. 21

Furfaro v. Seattle, Washington Supreme Court No. 58971-7 Order Recalling Mandate, Jan. 7, 2002 ..... App. 24

Furfaro v. Seattle, Washington Court of Appeals No. 43409-8-I Request for Briefing Letter, Mar. 27, 2002 ..... App. 25

CONSTITUTIONAL PROVISIONS AND STATUTES

Title 28 United States Code § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Article I, § 5 of the Washington Constitution provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Article I, § 7 of the Washington Constitution provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

In the pertinent part, Seattle Municipal Code § 6.270.100 provides:

> A(2) No employee or entertainer shall perform acts of or acts which simulate:
>
> > a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or any sexual acts prohibited by law;

b. The touching, caressing or fondling of the breasts, buttocks, or genitals; or;

c. The displaying of the pubic region, anus, vulva, or genitals; except as provided for in subdivision 1 of this subsection.

C. This chapter shall not be construed to prohibit expression, such as:

1. Plays, operas, musicals, or other dramatic works that are not obscene.

2. Classes, seminars, and lectures held for serious scientific or educational purposes that are not obscene; or

3. Exhibitions, performances, expressions or dances that are not obscene.

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations, as measured against community standards of:

a. Ultimate sexual acts, normal or perverted, actual or simulated; or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area, or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

Rick's is a non-alcoholic nightclub in Seattle that features nude dancing by female entertainers. Individual dancers perform strip tease routines in rotation on a stage accompanied by pre-recorded music. Each dance lasts two to three minutes, the length of a song.

On November 20, 1995, Seattle Police Detective Ken Swanson entered Rick's in an undercover capacity. As part of a pre-planned vice unit operation, Detective Swanson was investigating whether dancers were violating Seattle Municipal Code § 6.270.100, subsection (A)(2), by touching themselves on the breasts, buttocks, genitals or anus, or engaging in simulated masturbation, while performing on stage. Detective Swanson sat in front of the main stage and using a hidden tape recorder, recorded his observations of each of the dancers as they performed in succession on stage. Detective Swanson would turn on the tape recorder and make a verbal notation when he saw dancers touch or "massage" themselves in their private areas. However, he made no effort to observe the entire performance, nor to determine whether it was obscene.

After recording his observations, Detective Swanson left the business and met with other vice unit officers at a pre-arranged location. A group of officers then entered Rick's and arrested thirteen dancers and the manager

based on Detective Swanson's observations. When the officers entered the business, the lights were turned on and the customers were invited to leave. The dancers who were arrested were required to change clothes, hand over their costumes as evidence, and were taken to jail. The business was closed for approximately an hour and twenty minutes while the arrests were being made.

It was uncontested at trial that all acts leading to the arrests occurred while the individual dancers were performing a dance. (Resp. App. 10-20.) In his testimony, Detective Swanson described the dancing of Darcy Poole, one of the entertainers arrested in the raid. He testified that Poole was dancing and moving "in sync" with the music. She did not stop dancing to touch herself but the touching was interspersed throughout the entire performance. The touching lasted two to three seconds. Poole removed her costume slowly as part of a strip tease routine. Detective Swanson testified that all the performances that he observed that day were similar to that of Poole. All the entertainers appeared to be dancing and the touching was part of their dance.

In making their determination of probable cause, the arresting officers were exclusively concerned with whether dancers touched themselves on prohibited body parts. They paid no attention to the performances as a whole and did not consider obscenity. Captain Dan Oliver, the commanding officer of the operation, testified that if a dancer was observed touching herself on the breast she would be arrested, "even if she was doing a ballet". (Resp. App. 23.)

All of the dancers who were arrested were charged in the Seattle Municipal Court with violating Seattle Municipal Code § 6.270.100. One of the dancers went to trial and was acquitted. The charges against the remaining dancers were dismissed. Thereafter, the Respondents filed this civil action in state court. Respondents sought injunctive and declaratory relief and damages pursuant to Title 42 United States Code § 1983 based upon violation of their rights under the First, Fourth and Fourteenth Amendments. They also sought injunctive and declaratory relief based upon violation of their rights under the freedom of expression and privacy provisions of the State Constitution. Respondents claimed that the arrests were unlawful because the arresting officers failed to consider whether their performances were obscene and they failed to obtain a warrant.

Prior to trial, the trial court granted partial summary judgment to the City, ruling that the police were not required to obtain a warrant, and that the individual officers named as defendants in the lawsuit were immune. The matter then proceeded to trial on the issue of probable cause and damages. The trial court reserved ruling on the claims for injunctive and declaratory relief under the State Constitution until after trial. In the course of its deliberations, the jury sent out a written question asking whether the officers were required to consider obscenity in making their determination of probable cause. Over objection, the trial court instructed the jury that the officers were required to consider obscenity in making an arrest for expression but not if they were making an arrest for conduct. The jury proceeded to

return a verdict for the City. Following the verdict, all of Respondents' remaining claims were dismissed.

Respondents appealed the judgment directly to the Washington Supreme Court, which transferred the case to the Court of Appeals.[1] In their brief, Respondents argued that the arrests were unlawful under both the federal and state constitutions. The Court of Appeals reversed the judgment holding that the police violated the First and Fourth Amendments when they arrested Respondents for their stage performances, without first obtaining a judicial determination of obscenity. (Pet. App. 28-45.) The Court of Appeals remanded the case for trial on damages under 42 U.S.C. § 1983 and for injunctive and declaratory relief under the federal and state constitutions. (Pet. App. 45.)

Before the remand order could be carried out, the City petitioned for review of the Court of Appeals' decision by the Washington Supreme Court, and the request for review was granted. A majority of the Washington Supreme Court affirmed the judgment of the Court of Appeals but on different grounds. (Pet. App. 2.) The Court held that a warrant was not required under the First and Fourth Amendments and that Respondents' state constitutional claims did not give rise to a cause of

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[1] Under the Washington Rule of Appellate Procedure 4.2(a)(4), a party may seek direct review of a trial court decision by the Washington Supreme Court if the case involves, "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination". After the appeal is filed directly in the Washington Supreme Court, the Court may decide that grounds for direct review do not exist, in which case the matter is transferred to the Court of Appeals. *See*, RAP 4.2(e).

action under Title 42 United States Code § 1983. However, the Washington Supreme Court held that the police were required to consider obscenity in their determination of probable cause and therefore the jury was erroneously instructed that obscenity need not be considered. The case was remanded for a trial on the question of whether there was probable cause to believe that the dancing was obscene, and damages under § 1983.

Respondents filed a timely motion for reconsideration in the Washington Supreme Court. In the motion, Respondents argued the Court incorrectly stated in its opinion that the only issue raised on appeal was Respondents' claim for damages under § 1983 and the Court failed to address their claim for injunctive and declaratory relief under the state constitution. Respondents asked the Court to either consider the merits of their state constitutional claims or remand them for determination by the Court of Appeals.[2] The Washington Supreme Court granted reconsideration and changed its opinion. In the order granting reconsideration, the Court deleted the language from its opinion which precluded Respondents from seeking injunctive and declaratory relief under the federal and state constitutions and it remanded the case to the Court of Appeals, "to consider the

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[2] RAP 13.7(b) in the pertinent part provides, "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."

availability of injunctive and declaratory relief under the state constitution and issues left unresolved by this opinion."

REASONS FOR DENYING THE WRIT

Respondents maintain that the Washington Supreme Court incorrectly interpreted and applied federal law, but not for the reasons set forth in the petition.[3] In seeking to invoke this Court's certiorari jurisdiction, Petitioner has misstated the facts and mischaracterized the holding of the Washington Supreme Court. When these mischaracterizations are exposed and clarified, it becomes apparent that the Washington Supreme Court's rulings about which the City complains are unworthy of review. In any event, this Court lacks jurisdiction to entertain the petition because the judgment in state court is not final and there are unresolved issues of state and federal law. Moreover, in its present posture, this case does not fall within any of the exceptions to the final judgment rule set forth in this Court's decision in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S. Ct. at 1079, 43 L. Ed.2d 328 (1975). Therefore, the petition should be denied.

[3] As argued in their conditional cross petition, Respondents maintain that the Washington Supreme Court erred in failing to require the police to obtain a warrant and in permitting the police to vindicate their arrests through an after-the-fact determination of probable cause.

A. When Petitioner's Mischaracterizations Of The Record And The Holding Of The Washington Supreme Court Are Corrected, It Is Clear That Neither Of The Questions Presented In The Petition Are Worthy Of Review

Contrary to Petitioner's claims, the Washington Supreme Court did not extend significant new federal protection to adult entertainers, did not hold that all conduct occurring on a stage is presumptively protected expression, did not grant First Amendment protection to lap dancing or live sex acts, and did not hold that all conduct which an officer observes must be determined by him or her to be obscene regardless of what it consists of. These are gross exaggerations of the unremarkable holding of the Washington Supreme Court regarding the scope of Seattle Municipal Code § 6.270.100.

The Washington Supreme Court's decision follows from its earlier decision in *O'Day v. King County*, 109 Wn.2d 796, 749 P. 2d 142 (1988) which involved a King County Ordinance identical to the Seattle Ordinance applied in this case. The decision in *O'Day* was expressly based upon Article I, § 5, the free expression clause of the Washington Constitution, rather than the First Amendment. *Id.* at 802. The King County Ordinance provided:

> No employee or entertainer shall perform acts of or acts which simulate:
>
> (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts prohibited by law; or
>
> (b) The touching, caressing, or fondling of the breasts, buttocks or genitals; or

> (c) The displaying the pubic hair, anus, vulva or genitals; except as provided for in subdivision 6 of this subsection and section 6.08.050(D)(3) of this chapter.

Subsection 6 referred to in standard (c) required performances involving nudity to take place on a stage six feet from the nearest patron and eighteen inches off the ground. Section 6.08.050(D)(3) provided that the Chapter should not be construed to prohibit exhibitions or dances that are not obscene.[4]

The plaintiffs in *O'Day* argued that the King County ordinance was overbroad because the non-obscene dance exception only applied to the activities described in standard (c), and not to those described in (a) or (b) and therefore it banned constitutionally protected expression. The Washington Supreme Court acknowledged that the regulation was overbroad but elected to cure the defect by a judicial construction, which involved reading the non-obscene dance exception into standards (a) and (b). The Court stated:

> By themselves, the standards of conduct are overly broad and reach protected expression. However, the non-obscene dance dramatic works exception, the scientific and educational purposes exception, and the non-obscene dance exception of KCC 6.08.050(D) read together with the standards of conduct, can limit chapter

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[4] The definition of obscenity in the King County Ordinance, like the definition of obscenity in the Seattle Ordinance, follows the definition contained in this Court's decision in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2007, 37 L. Ed.2d 419 (1973).

> 6.08's application to pure conduct and obscene expression.

109 Wn.2d at 806.

In another part of the opinion, the Court in *O'Day* upheld that portion of the King County ordinance which required that nude dancing take place on a stage set back six feet from the audience, because it was aimed at curbing illegal conduct rather than expression. 109 Wn.2d at 808-810. However, in order to draw a distinction between nude expression, which is protected by the Washington Constitution, and nude conduct which is not, the Court limited the ban on self-touching private body parts and on engaging in simulated sex acts to activities which do not occur as part of non-obscene expression such as dance. In other words, under the King County ordinance construed in *O'Day*, if simulated sex acts are performed in the course of expression, obscenity under the *Miller* test is an element of the crime, *as a matter of state law.*

In this case, the Washington Supreme Court merely applied this Court's general probable cause test to the Seattle ordinance as judicially construed in *O'Day*. Probable cause exists where the facts and circumstances within the officers' knowledge of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 879 (1949); *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed.2d 824 (1979). According to the decision in *O'Day*, if simulated sex acts are performed in the course of non-obscene expression, then the individuals performing the acts have

not committed a crime. The Washington Supreme Court simply held that if officers charged with making the arrest are confronted with colorable expression, they must consider obscenity, since otherwise there is no reasonable basis for believing that a crime has occurred.

According to the Washington Supreme Court, the necessity of an obscenity determination arises when arresting officers observe what appears to be expression. Relying on this Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed.2d 265 (2000), the Washington Supreme Court held that nude dancing is expressive conduct. (Pet. App. 18). Since the uncontested evidence was that Respondents were engaged in nude dancing, an obscenity determination was required. The court stated:

> In Kidder's case and in Silva's case, if performers were engaged in nude dancing, their activities would fall under the category of expressive conduct and not pure conduct. There is ample evidence in the record to indicate that the performers were dancing; the detective present testified to that effect. Rep. Tr. (Dec. 11, 1997) at 10. Thus the performers were engaged in expressive conduct which potentially falls under the exception for protected expression in SMC 6.270.100(C). Since SMC 6.270.100(C) says that "[t]his chapter shall not be construed to prohibit protected expression," before officers making arrests for violations of the standards of conduct in SMC 6.270.100(A), the arresting officers or a judicial officer must make a determination, *where expressive conduct is involved*, that the expressive conduct is obscene as defined in SMC 6.270.100(D). In order to have probable

> cause to arrest Kidder and Silva, the city needed probable cause to believe that the dancers' expressive conduct was obscene and hence unprotected by the exception in .100(C).

(Pet. App. 18, 19).

It is apparent that the Washington Supreme Court drew a fact-based distinction between the dancing which occurred in this case, which requires an obscenity determination, and other activities which might not require that determination. Notwithstanding Petitioner's suggestion to the contrary, the Washington Supreme Court did not hold that an obscenity determination is required regardless of what officers observe nor did it hold that that live sex acts or lap dancing would require a determination of obscenity. (Pet. 12-14.) Based upon the language in the ordinance, and the judicial construction given to the ordinance in *O'Day*, the Washington Supreme Court drew a workable distinction between the type of live entertainment that requires an obscenity determination and that which does not. As pointed out in the conditional cross petition, the Washington Court strayed from the First and Fourth Amendments in holding that the police as opposed to a magistrate are entitled to make the threshold determination of obscenity and in holding that the police need not consider obscenity so long as there is an after-the-fact determination of probable cause to believe that the dancing was obscene. However, neither question is presented in this petition.

Petitioner is incorrect in claiming that Respondents Kidder and Silva denied that they touched themselves and in claiming that they never testified that they

intended to convey a message.[5] At trial, Respondent Kidder testified that she touched herself in a sensual sexy way, and denied that the touching was masturbation. (Resp. App. 2-4.) She testified that the touching was part of her dance and the message that she was attempting to convey was that she was sexy and desirable. (Resp. App. 4, 5.) Respondent Silva testified that she touched her breasts, buttocks, and covered her crotch in the course of her dance, but similarly rejected the City's suggestion that what she did was masturbation. (Resp. App. 5-9.) She testified that she was attempting to convey a sensual, sexy message. (Resp. App. 9.) Petitioner is also stretching the truth in its claim that the officers made arrests for sex acts. In response to questions posed on cross examination, Detective Swanson testified that if he observed masturbation, he would have recorded it on the tape. (Resp. App. 18.) There is nothing on the tape to reflect that he observed this type of activity. (Pet. App. 84-87.)

Each of the questions posed in the petition is based upon a mischaracterization of what the Washington Supreme Court did in this case, a misperception of the record facts, or both. In reality, Petitioner is complaining about the manner in which the ordinance was construed by the Washington Supreme Court, in response to the

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[5] In any case, Respondents' subjective intentions with regard to their message is completely irrelevant to the determination of probable cause, which is based upon the circumstances appearing to the officers or a magistrate at the time of the arrest.

dictates of state law, and is suggesting that the Washington Court incorrectly decided that nude dancing is entitled to a measure of First Amendment protection. The first of these complaints does not give rise to a federal question at all and the second treads on law that is sufficiently well settled that it need not be revisited by this Court. Therefore, the petition should be denied.

B. This Court Lacks Jurisdiction To Grant The Petition Because the Judgment Is Not Final

At present, this case is in the Washington Court of Appeals pending a decision on whether a warrant is required by the free expression and privacy clauses of the State Constitution. Left to be decided is the question of whether Respondents are entitled to injunctive and declaratory relief under the state and federal constitutions and the question of whether there was probable cause to believe that Respondents' dancing was obscene. No judgment has been entered in either the appellate court or the trial court. Following the entry of the remand order on December 15, 2001, the Washington Supreme Court erroneously issued the mandate. However, the Court later recognized the mandate was issued in error and it was recalled. (Resp. App. 24.) Under the Washington Rules of Appellate Procedure, the order from which certiorari is now sought is merely an interlocutory decision.[6]

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[6] RAP 12.5(a) provides, A "mandate" is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating

A state court judgment is subject to review by this Court only if it is final. *Jefferson v. City of Tarrant*, 522 U.S. 75, 80, 118 S. Ct. 421, 139 L. Ed.2d 433 (1997). Otherwise, Title 28 U.S.C. § 1257(a) operates as a jurisdictional bar. *Id.* This Court has stated that the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 89 L. Ed.2d 569 (1945). To be reviewable, a state court judgment must be final in two senses: it must be subject to no further review or correction in any state tribunal, and it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Jefferson*, 522 U.S. at 80. In this case, there has been no final judgment in either sense. The judgment is subject to review and correction in the Washington Court of Appeals and is potentially subject to another round of state appellate review following the trial court's decision. Respondents' claims for injunctive and declaratory relief and the issue of probable cause have yet to be adjudicated and there has been no final determination of the litigation. Since no judgment has been entered in this case, final or otherwise, Title 28 U.S.C. § 1257(a) operates as a jurisdictional bar.

In *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 477, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975), this Court recognized the existence of a limited number of exceptions to the final judgment rule in cases where the highest court of the state has finally determined the federal issue present

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review. No mandate issues for an interlocutory decision of the appellate court."

in a particular case, but in which there are further proceedings in the lower state courts to come. In regard to these exceptions, this Court stated:

> In most, if not all of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and delayed justice," *Radio Station WOW, Inc. v. Johnson*, supra, at 124, 89 L. Ed. 2092, as well as precipitate interference with state litigation.

Id. at 477.

This Court in *Cox Broadcasting* proceeded to describe four specific exceptions. In the first two, the federal issue would not be mooted or otherwise effected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal questions. 420 U.S. at 478. In the other two, the federal issue would be mooted if the petitioner or appellant seeking to bring the action before this Court prevailed on the merits in the later state court proceeding, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts. *Id.* An analysis of each of the exceptions compels the conclusion that Petitioner cannot establish a basis for disregarding the final judgment rule.

In the first category, there are further proceedings yet to occur in state court, but the prior determination of the federal issue is conclusive or the outcome of further

proceedings preordained. *Cox Broadcasting*, 420 U.S. at 479. "In these cases because the case is for all practical purposes concluded, the judgment on the federal issue is deemed final." *Id.* With this case in its present posture, there are remaining federal issues yet to be adjudicated. These include the Respondents' claim for injunctive and declaratory relief under the First Amendment and Fourth Amendment and the determination of probable cause, not to mention ancillary questions that may arise at trial such as which side has the burden of proof on the issue of probable cause. Therefore, this exception doesn't apply.

The second exception involves cases in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of further state proceedings. *Cox Broadcasting*, 420 U.S. at 480. This exception is inapplicable if resolution of the claims remaining in state court would moot the federal question presented in the certiorari petition. *Jefferson*, 522 U.S. at 80. If Petitioner prevails on the remaining federal claims, then the issues raised in its petition will become moot. Since the claims presented in the petition may not survive the outcome of future state proceedings, this exception is inapplicable.

In the third category are situations where the federal claim has been finally decided, with future proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Cox Broadcasting*, 420 U.S. at 481. In these cases, if the party seeking interim review prevails on the merits the federal issue will become moot, and if it were to lose, the governing state law would prevent it from presenting its federal claims for review.

Id. This exception is clearly inapplicable in this case. If Petitioner loses at trial, there is nothing in state or federal law to prevent it from filing another petition for certiorari.

The last exception involves cases where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or the admissibility of, evidence in state court proceedings yet to come. *Cox Broadcasting*, 420 U.S. at 482, 483. In these circumstances, if a refusal to immediately review the state court decision might seriously erode federal policy, this Court has entertained and decided the federal issue which itself has been finally determined by the state courts for purposes of the state litigation. With the case in its present posture, resolution of the federal issues presented in this petition will not end the litigation because there are remaining state claims yet to be adjudicated in state court. Moreover, this case arises from enforcement of a local ordinance wherein a local government has elected to exempt non-obscene nude dancing from criminal liability under the ordinance. Under these circumstances, where a city seeks to vindicate an alleged local interest in regulating adult entertainment, and where, from Petitioner's standpoint, there is no imminently threatened loss of federal rights, no federal

policy will be frustrated if the state courts are given the first opportunity to resolve the remaining claims.[7]

CONCLUSION

Respondents concur that this case presents important federal questions, but not those presented in the petition. The questions in this petition are based on the inaccurate and highly exaggerated contention that the Washington Supreme Court extended presumptive First Amendment protection to any behavior engaged in by a dancer, such that the police are required to consider obscenity whenever they make an arrest. Contrary to the City's claims, the State Court's ruling is expressly limited to situations where officers observe simulated sex acts (or the self-touching of private body parts) performed in the course of dancing on a stage. Since the portion of the state court's ruling complained of by the City does not present broad federal questions, but instead is based upon state constitutional law and well-settled federal law, the petition should be denied.

Moreover, Petitioner is seeking review of an interlocutory order, and this Court therefore lacks jurisdiction

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[7] In *Cox Broadcasting*, and in all the cases which are cited therein as examples of this exception, the state court decision involved a potential abridgement of federal constitutional or statutory rights. 420 U.S. at 482-485. No such potential abridgement exists in this case. From Petitioner's standpoint, the worst thing that can happen is that the state court may elect to overprotect federal rights, which has never been held to be sufficient cause for circumventing the final judgment rule.

to hear the case. The *Cox Broadcasting* exception to the final judgment rule is inapplicable to the present petition because there are unresolved questions of state and federal law which could conceivably moot the question presented in the petition and because, from Petitioner's standpoint, no federal policy or right is imminently threatened if this case awaits the outcome of further proceedings in the state courts.

For all of these reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

Rep.Tr., Dec. 9, 1997, pp. 52, 63-65
(Witness Kidder).....App. 1

Rep.Tr., Dec. 9, 1997, pp. 125, 131-134
(Witness Silva).....App. 5

Rep.Tr., Dec. 11, 1997, pp. 1-11
(Witness Swanson).....App. 10

Rep.Tr., Dec. 15, 1997, pp. 31-33
(Witness Oliver).....App. 21

Fufaro v. Seattle, Washington Supreme Court
No. 58971-7 Order Recalling Mandate,
Jan. 7, 2002.....App. 24

Furfaro v. Seattle, Washington Court of Appeals
No. 43409-8-I Request for Briefing Letter,
Mar. 27, 2002.....App. 25

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, AND JJR, INC., PLAINTIFFS, VS. CITY OF SEATTLE, ET AL., DEFENDANTS.	66551-6 96-2-02226-8SEA

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 9, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

* * *

[52] A. MY NAME IS BRANDY KIDDER AND I LIVE AT 10 OLDE TAVERN DRIVE, WENDELL, NORTH CAROLINA.

Q. HOW OLD ARE YOU?

A. I'M 23. I WILL BE 24 NEXT WEDNESDAY.

Q. ARE YOU MARRIED?

A. NO.

Q. AND ARE YOU ENGAGED?

A. YES, I AM.

Q. AND WHO DO YOU LIVE WITH IN NORTH CAROLINA?

A. I LIVE WITH MY FIANCE DAN AND MY THREE BEAUTIFUL CHILDREN. I HAVE TWO SONS, SIX AND THREE, AND THEN I HAVE A 14-MONTH-OLD GIRL.

Q. WHEN DID YOU MOVE TO NORTH CAROLINA?

A. IN SEPTEMBER OF THIS YEAR.

Q. RECENTLY?

A. YES.

Q. BEFORE THAT TIME, WHERE WERE YOU LIVING?

A. I WAS LIVING IN BOTHELL, WASHINGTON.

* * *

[63] Q. CAN YOU DESCRIBE HOW YOU DANCED ON STAGE THAT DAY?

A. WELL, YEAH. IT WAS PRETTY MUCH NO DIFFERENT THAN ANY OTHER TIME. EVERY TIME I WOULD START MY STAGE PERFORMANCES, I WOULD GO UP TO THE RIGHT SIDE OF THE STAGE. AND THEY HAD A HUGE MIRROR AND I WOULD RUN – I WOULD GET ON THE STAGE. I WOULD RUB MY HANDS ON THE WALK ACROSS THE STAGE WITH MY HAND ON THE MIRROR, A LOT OF EYE CONTACT WITH THE AUDIENCE. I WOULD DANCE MORE OF A FLOWY – BUT IT REALLY WASN'T LIKE A REALLY BUSY DAY OR ANYTHING. I DIDN'T LIKE OVER EXERT MYSELF IN ANY WAY, SHAPE OR FORM. I JUST WAS UP THERE TO ENJOY MYSELF AND LISTEN TO THE MUSIC. I WENT THROUGH A LOT OF

TURNS. I WOULD PUT MY HANDS ALL OVER MY BODY IN THE PACES OF MOVING TO THE MUSIC. AND, YOU KNOW, IT WAS JUST VERY TYPICAL. IT WAS A VERY TYPICAL DANCE.

Q. DID YOU REMOVE YOUR CLOTHING DURING THE [64] DANCES?

A. YES. AT THE TIME, I CAN'T SAY EVERY DANCE I REMOVED ALL OF MY CLOTHING, BUT I AT LEAST MOVED MY TOP DURING EVERY DANCE PERFORMANCE I HAD ON THAT DAY.

Q. YOU SAID YOU TOUCHED YOURSELF ALL OVER YOUR BODY. CAN YOU DESCRIBE THAT IN MORE DETAIL?

A. YES. LIKE WHEN I WOULD TAKE OFF MY TOP, I WOULD – THIS WAS A FRONT TOP, SO IT WOULD UNDO IN THE FRONT. I WOULD TAKE OFF MY TOP AND I WOULD BE MOVING TO THE MUSIC. I WOULD PULL IT OFF AND I WOULD TAKE IT DOWN AND I WOULD TURN AND, YOU KNOW, THROW IT TO THE SIDE, OR GO TO THAT SIDE AND, WITH MY HANDS, I WOULD CARESS MY BODY WITH THE MUSIC. I WAS TOTALLY DANCING, ENJOYING MYSELF. I WOULD RUB MY LEGS, MY THIGHS. MY HAND WOULD GO ACROSS THE BOTTOM SIDE OF MY BUT AND MY BACK. IT WAS ALL FLOWY. MY HANDS DID NOT TECHNICALLY JUST STAY IN ONE AREA. THEY WERE MOVING WITH THE MUSIC AS WELL AS MY BODY WAS.

Q. WAS THIS TOUCHING A PART OF THE REST OF YOUR DANCE?

A. OH, YES. I WAS TOTALLY WITH MY DANCE ROUTINE.

Q. DID YOU EVER MASTURBATE DURING –

A. NO. NO.

Q. – THE STAGE PERFORMANCE?

[65] A. NO. THE TYPE OF DANCING I WAS DOING, THE TOUCHING OF MY BODY COULD NEVER ESCALATE, IN MY OPINION, UPON MYSELF, I WOULD HOPE. ALSO I WOULD NEVER ESCALATE TO THAT POINT.

Q. CAN YOU THINK OF – OBVIOUSLY TRYING TO SHOW US WITH YOUR HANDS, CAN YOU THINK OF WORDS TO DESCRIBE THE WAY THAT YOU TOUCHED YOURSELF?

A. VERY SENSUAL, VERY SENSUAL, SEXY WAY. JUST MY AURA, I GUESS. IT WAS THE WAY I FELT.

Q. WAS THERE ANY PARTICULAR KIND OF MESSAGE OR MEANING TO YOUR DANCING ON-STAGE?

A. YES. I WAS SEXY AND, YOU KNOW, THE PEOPLE OUT THERE, THEY WERE WATCHING ME THAT, YOU KNOW, HEY, I WOULD LIKE TO SPEND A FEW MINUTES WITH HER OR SOME TIME WITH HER. I WANTED THEM TO SEE ME AS A SEXY PERSON.

Q. DID TOUCHING YOURSELF CONTRIBUTE TO THAT MESSAGE?

A. WELL, DANCING, IN THE PROCESS OF TOUCHING MYSELF IN A DANCING WAY, YES.

* * *

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[125] DIRECT EXAMINATION +

BY MR. LEVY:

Q. WOULD YOU STATE AND SPELL YOUR NAME.

A. ESMERALDA SILVA, E-S-M-E-R-A-L-D-A, S-I-L-V-A.

Q. MISS SILVA, HOW OLD ARE YOU?

A. I'M 27.

Q. WHAT IS YOUR ADDRESS?

A. 25234 45TH PLACE SOUTH, KENT, WASHINGTON.

Q. WHERE WERE YOU BORN?

A. OTHELLO, WASHINGTON.

* * *

[131] Q. WHEN YOU WERE DANCING AT RICK'S, DID YOU WEAR SOME TYPE OF A COSTUME?

A. YEAH, I HAD MANY DIFFERENT THINGS. I HAD DRESSES. I ALWAYS WORE HIGH HEELS, LIKE FIVE-INCH HEELS. WE CALL THEM HOT PANTS, LIKE SOME PEOPLE CALL THEM DAISY DUKE SHORTS. JUST LACE BRAS AND MATCHING PANTIES, LIKE

SWIM SUIT TYPE OUTFITS, YOU KNOW, THAT WERE COLORFUL.

Q. WHEN YOU WERE DANCING, WOULD THE MUSIC BE PLAYING CONTINUOUSLY THROUGHOUT YOUR DANCE?

A. THE WHOLE TIME.

Q. NOW, YOU MENTIONED THAT AS PART OF YOUR DANCE, THERE WAS SOME TYPE OF COSTUME REMOVAL. WOULD YOU DESCRIBE THAT FOR THE JURY, PLEASE?

A. WELL –

Q. OKAY. I'M SORRY, GO AHEAD.

A. CAN YOU –

Q. DID YOU TAKE IT OFF ALL AT ONCE? DID YOU TAKE IT OFF IN A CERTAIN MANNER?

[132] A. I TOOK IF OFF KIND OF IN A STRIP TEASE WAY, ONE SHOULDER OFF, ANOTHER, PUT IT TO THE SIDE. SOMETIMES I NEVER TOOK ANYTHING OFF. SOMETIMES I MAY HAVE JUST PULLED IT DOWN, PUT IT BACK UP, AS FAR A MY TOP. MY BOTTOMS, I WOULD PULL THEM DOWN A LITTLE TO WHERE NOTHING WAS SHOWING AND THAT WOULD BE ABOUT IT.

Q. YOU MENTIONED, MISS SILVA, TOUCHING YOURSELF. WHAT DO YOU MEAN BY THAT?

A. I TOUCHED MY BREASTS WHEN I WOULD PULL MY PANTIES DOWN BECAUSE I DIDN'T TAKE THEM OFF. I PUT MY HAND TO COVER MYSELF IN

MY CROTCH AREA. I TOUCH MY LEGS, MY ARMS IN THE FLOW OF THE MUSIC. I WOULD PUT MY HAND ACROSS MY BREAST TO COVER, THEN LET, YOU KNOW, OPEN UP. I WAS ALWAYS TOUCHING MYSELF IN THE DANCE.

Q. ALL RIGHT. WHEN YOU TOUCHED YOURSELF ON YOUR BREASTS, WOULD YOU DO THAT CONTINUALLY THROUGHOUT THE DANCE?

A. NO. NO.

Q. FOR WHAT PERIOD OF TIME DURING THE DANCE ROUTINE WOULD YOU BE TOUCHING YOURSELF ON YOUR BREASTS?

A. ARE YOU ASKING ME TO GIVE YOU SECONDS?

Q. APPROXIMATION.

A. THREE TO FIVE SECONDS MAYBE. YOU'RE DANCING, YOU'RE CONSTANTLY MOVING. YOU'RE NOT STOPPING. THE MUSIC IS CONSTANTLY PLAYING. I WOULD GET INTO THE [133] MUSIC AND MY BODY WAS CONSTANTLY MOVING. I JUST DIDN'T STOP AND DO ONE THING. I WAS CONSTANTLY IN THE FLOW OF MOVING WITH THE MUSIC.

Q. WAS THE BREASTS TOUCHING PART OF THE DANCE?

A. MY DANCE, YES.

Q. WHY WAS IT PART OF THE DANCE?

A. TO ME, TOUCHING MY BODY, I FELT I WAS COMFORTABLE WITH MY BODY. IT WAS – TO ME, I

WAS GIVING A SEXY SENSUAL MESSAGE THAT IT WAS PART OF MY DANCE.

Q. DID YOU, AS PART OF YOUR DANCE OR WHILE YOU WERE ON STAGE, TOUCH YOURSELF IN THE CROTCH AREA?

A. AS I STATED BEFORE, I NEVER REMOVE MY BOTTOMS. I WOULD PULL THEM DOWN AS A VISUAL SEXY THING THAT I FELT I WAS BEING SEXY. I PLACED MY HAND TO COVER MY CROTCH AND THAT WAS ALL I DID.

Q. WAS THAT PART OR SEPARATE FROM YOUR DANCE – EXCUSE ME.

WAS THAT PART OF OR SEPARATE FROM YOUR DANCE?

A. IT WAS PART OF MY DANCE. I WAS BEING SEXUAL AND SENSUAL, AND I WOULD DO THAT JUST LIKE I WOULD COVER MY BREAST WITH MY HAND.

Q. DID YOU EVER TOUCH YOURSELF ON THE BUTT?

A. I BELIEVE SO, YES.

Q. WHY?

[134] A. IN THE FLOW OF THE DANCE, I TOUCHED MY LEGS, I TOUCHED MY ENTIRE BODY. I PLAYED WITH MY HAIR. I FLIPPED MY HAIR BACK.

Q. YOU WERE HERE DURING THE EXAMINATION OF MISS KIDDER?

A. YES.

Q. DO YOU RECALL COUNSEL USING THE EXPRESSION OR PHRASE, A "SIMULATED MASTURBATION"?

A. YES, I DO.

Q. DID YOU DO THAT?

A. I DON'T BELIEVE I SIMULATED OR ANYTHING I DID WAS ANYTHING REMOTELY CLOSE TO MASTURBATION.

Q. DID YOU EVER INSERT YOUR FINGERS IN YOURSELF?

A. NEVER.

Q. WHEN YOU WERE DANCING ON STAGES AT RICK'S, WHAT WAS THE MESSAGE THAT YOU WERE TRYING TO CONVEY?

A. AS I SAID BEFORE, I FELT IF WAS BEING EROTIC. THE MUSIC I DANCED TO WAS EROTIC. I WAS GIVING A SEXY SENSUAL MESSAGE.

* * *

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, AND JJR, INC.,	)	66551-6
PLAINTIFFS,	)	96-2-02226-8SEA
VS.	)	
CITY OF SEATTLE, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 11, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

* * *

[1] DIRECT EXAMINATION + (RESUMED)

BY MR. LEVY:

Q. DETECTIVE SWANSON, DO YOU RECOGNIZE THE AUDIO TAPE I HAVE JUST PLAYED?

A. YES.

Q. AND IS THAT AN ACCURATE RENDITION OF THE AUDIO TAPE THAT YOU MADE WHEN YOU WENT INTO RICK'S NIGHTCLUB ON NOVEMBER 20TH, 1995?

A. YES, IT IS.

[2] Q. HOW LONG WOULD YOU ESTIMATE THE TAPE WAS, THE RECORD THAT WE HAVE JUST HEARD? TEN MINUTES?

A. SOMETHING LIKE THAT, PROBABLY 10, 15 MINUTES. I WASN'T WATCHING THE TIME.

Q. AND THE LENGTH OF TIME THAT YOU WERE IN THE BUSINESS WAS ROUGHLY 40 MINUTES?

A. THAT'S ABOUT RIGHT.

Q. AND IN TERMS OF THE OBSERVATIONS THAT YOU RECORDED FOR EACH INDIVIDUAL ENTERTAINER, WOULD THAT HAVE BEEN MAYBE 45 SECONDS WORTH OF OBSERVATION PER PERSON ROUGHLY?

A. YEAH. I SUPPOSE AVERAGE, YEAH.

Q. NOW, I HEARD – AND CORRECT ME IF I'M MISTAKEN – I HEARD SOUNDS, AUDIBLE SOUNDS ON THE TAPE INDICATING THAT YOU WERE TURNING THE TAPE RECORDER ON AND OFF; IS THAT CORRECT?

A. THAT'S RIGHT.

Q. NOW, IF WE COULD, PLEASE, DO YOU RECALL – WOULD YOU TAKE A LOOK AT 4 IN YOUR BOOK THERE, PLEASE. EXCUSE ME, I'M SORRY. WOULD YOU LOOK AT ITEM NUMBER 5?

A. YES. I HAVE IT.

Q. AND IS ITEM NUMBER 5, IS THAT THE TRANSCRIPT THAT WE WERE TALKING ABOUT YESTERDAY?

A. YES, IT IS.

Q. NOW, THE FIRST ENTRY ON ITEM NUMBER 5 WHERE [3] IT MAKES REFERENCE TO AN ENTERTAINER BY THE NAME OF GABRIELLE, DID YOU LATER LEARN THAT THAT PERSON WAS THE PLAINTIFF IN THIS CASE, BRANDY KIDDER?

A. YES.

Q. AND AT THE BOTTOM OF PAGE 1 WHERE IT MAKES REFERENCE TO "JESSIE, HISPANIC, FEMALE, LONG, BLACK HAIR," IS THAT THE REFERENCE TO THE PLAINTIFF IN THIS CASE, ESSIE SILVA?

A. YES.

Q. WOULD YOU TURN TO PAGE 3 OF THE TRANSCRIPT WHERE REFERENCE IS MADE TO AN INDIVIDUAL BY THE NAME OF CHANEL?

A. YES.

Q. DO YOU UNDERSTAND THAT THE PERSON THAT YOU REFERRED TO IN THE TAPE AS CHANEL IS AN INDIVIDUAL BY THE NAME OF DARCY POOLE?

A. I BELIEVE THAT'S CORRECT, YES.

Q. DO YOU RECALL MISS POOLE?

A. YES.

Q. DID YOU MAKE ANY OBSERVATIONS OF THE PERFORMANCE OF MISS POOLE OTHER THAN THAT WHICH YOU RECORDED ON THE AUDIO TAPE?

A. I'M NOT SURE I UNDERSTAND WHAT YOU MEAN.

Q. WELL, I'D LIKE YOU TO THINK BACK NOW TO THE FATEFUL DAY OF NOVEMBER 20TH, 1995, AND I'M GOING TO ASK [4] YOU SOME QUESTIONS, A SERIES OF QUESTIONS ABOUT WHAT YOU SAW WHEN YOU WERE OBSERVING MISS POOLE.

WAS MISS POOLE PERFORMING A DANCE?

A. YES.

Q. DID IT APPEAR TO YOU AT THE TIME THAT SHE WAS MOVING IN RHYTHM TO THE MUSIC?

A. YES, SHE WAS.

Q. IN THE COURSE OF THE DANCE, WAS SHE, AS YOU RECORDED ON THE TAPE, SHE TOUCHED HERSELF AND TWEAKED AND POKED HERSELF IN HER PRIVATE AREAS; IS THAT CORRECT?

A. THAT'S CORRECT, YES.

Q. WAS THIS – THE PERFORMANCE ITSELF, WAS THIS A SINGLE PERFORMANCE, A SINGLE CONTINUOUS PERFORMANCE OR DID SHE STOP DURING THE DANCE AND TOUCH HERSELF?

A. YOU MEAN STOP MOVING OR STOP –

Q. STOP MOVING AND DANCING AND JUST TOUCH HERSELF.

A. AH, SHE DIDN'T STOP MOVING TO TOUCH HERSELF, NO.

Q. AT THE CONCLUSION OF THE PERFORMANCE, COULD YOU HEAR IF THE AUDIENCE WAS CLAPPING?

A. I BELIEVE THERE WAS A SMATTERING OF APPLAUSE. I DON'T THINK THERE WERE A LOT OF PEOPLE THERE. YEAH, I THINK THERE WERE A FEW PEOPLE THAT PUT THEIR HANDS TOGETHER.

[5] Q. COULD YOU HEAR THAT ON THE TAPE, SIR?

A. I DON'T RECALL. IT'S POSSIBLE. I DON'T SPECIFICALLY REMEMBER WHETHER YOU COULD HEAR IT AT THE END OF HERS OR NOT.

Q. IN THE CASE OF MISS POOLE, THE TOUCHING THAT YOU OBSERVED AND RECORDED ON THE AUDIO TAPE, WAS THAT INTERSPERSED THROUGHOUT THE ENTIRE PERFORMANCE, OR DID SHE TOUCH HERSELF IN THE PRIVATE AREAS CONTINUOUSLY THROUGHOUT THE PERFORMANCE?

A. IT WAS INTERSPERSED THROUGHOUT THE PERFORMANCE.

Q. DO YOU RECALL THE PHYSICAL DESCRIPTION OF THE MAIN STAGE, SIR? OR DO YOU RECALL WHAT THE MAIN STAGE AT RICK'S LOOKED LIKE WHEN YOU WERE THERE?

A. YES.

Q. COULD YOU TELL THE JURY YOUR RECOLLECTION WHAT IT LOOKED LIKE?

A. IT'S – I'M NOT SURE OF THE DIMENSIONS – ROUGHLY SIX OR SEVEN FEET WIDE, PROBABLY FOUR OR FIVE FEET DEEP. THERE ARE MIRRORS AGAINST THE REAR WALL, LIGHTS, STAGE LIGHTS

OVERHEAD. THE STAGE ITSELF IS PROBABLY THREE FEET ELEVATED FROM THE MAIN FLOOR.

Q. DO YOU RECALL IF MISS POOLE MADE USE OF THE WALLS AND MIRRORS IN THE COURSE OF HER DANCE?

A. AH, YES, SHE DID. THE MIRRORS. THERE ARE [6] NO WALLS OTHER THAN THE MIRROR ON THE WALL.

Q. CAN YOU DESCRIBE, SIR, THE MANNER IN WHICH SHE MADE USE OF THE MIRRORS?

A. AS I RECALL, SHE WAS FACING AWAY FROM THE AUDIENCE TOWARD THE MIRROR, LEANING WITH HER TORSO FORWARD, HER LEGS AND BUTTOCKS FACING TOWARDS THE AUDIENCE. SHE WAS MOVING HER HIPS, BUT I DON'T REMEMBER SPECIFICALLY ANY OTHER ACTIONS.

Q. DETECTIVE SWANSON, WHEN SHE WAS DOING THE MIRROR MOVE, DID YOU OBSERVE THE POSITION OF HER HANDS?

A. AT ONE POINT, I KNOW THAT BOTH HANDS WERE ON THE MIRROR. I DON'T KNOW WHETHER THEY STAYED THERE OR NOT. I REALLY DON'T REMEMBER THAT CLEARLY.

Q. AT ANY TIME IN THE COURSE OF HER PERFORMANCE, DID SHE KICK HER LEGS?

A. YES, I BELIEVE SHE DID.

Q. I TAKE IT THAT AT SOME POINT IN THE COURSE OF HER PERFORMANCE, MISS POOLE REMOVED THE COSTUME THAT SHE WAS WEARING?

A. YES.

Q. WHEN SHE REMOVED THE COSTUME, DID SHE DO IT SLOWLY AND IN SYNC WITH THE MUSIC?

A. AH, YES, I SUPPOSE YOU COULD SAY THAT. SHE TOOK – I REMEMBER THAT WHEN SHE TOOK HER TOP OFF, SHE WAS MOVING WHEN SHE TOOK IT OFF. AND SHE WAS, AS I [7] RECALL, MOVING IN SYNC TO THE MUSIC. SHE DIDN'T REMOVE IT NECESSARILY IN SYNC TO THE MUSIC, BUT SHE WAS MOVING IN SYNC.

Q. OKAY. I GUESS MY QUESTION HERE, DETECTIVE SWANSON, IS WHEN SHE REMOVED HER COSTUME, DID SHE JUST GRAB IT AND TAKE IT OFF AT ONE POINT IN TIME OR DID SHE REMOVE IT MORE SLOWLY?

A. SHE DIDN'T RIP IT OFF, IF THAT'S WHAT YOU'RE ASKING. SHE UNDID IT AND TOOK IT OFF, I THINK, MORE SLOWLY THAN JUST YANKING IT OFF HER SHIRT OR SOMETHING.

Q. WAS IT KIND OF A TEASE?

A. I SUPPOSE YOU COULD SAY THAT.

Q. NOT YOUR CUP OF TEA?

A. NOT NECESSARILY. BUT, YEAH, I SUPPOSE SO.

Q. WHEN SHE TOUCHED HERSELF ON HER BREASTS OR IN THE CROTCH AREA, APPROXIMATELY HOW LONG DID THE TOUCHING LAST?

A. TWO TO THREE SECONDS APPROXIMATELY.

Q. YOU OBSERVED THE ROUTINE OF MISS POOLE AND YOU ALSO OBSERVED THE ACTIVITIES OF THE 12 OR 13 OTHERS THAT DAY?

A. YES.

Q. HOW WOULD YOU COMPARE THE DANCING OF MISS POOLE TO THE OTHER INDIVIDUALS THAT YOU OBSERVED? WAS IT SIMILAR? DIFFERENT?

[8] A. THEY'RE ALL SIMILAR. THERE IS NOT A GREAT DEAL OF VARIETY. VERY SELDOM, ANYWAY. I THINK SHE HAD A BETTER SENSE OF RHYTHM MAYBE THAN SOME OF THE DANCERS ARE. PROBABLY SLIGHTLY MORE ATHLETIC THAN SOME OF THE OTHER ONES. THE DANCES ARE SIMILAR.

Q. IN REFERENCE TO MISS POOLE AND THE OTHER DANCERS, WOULD YOU SAY THAT YOU SAW THE SAME DANCE MOVES OVER AND OVER AND OVER AGAIN?

A. I WOULD SAY THAT THEY WERE SIMILAR DANCE MOVES REPEATED, YES. SOME OF THE PERFORMERS ARE MAYBE BETTER ABLE TO PUMP THE MOVES OFF, BUT THEY'RE QUITE SIMILAR, YES.

Q. WITH REFERENCE TO MISS POOLE, WOULD YOU SAY THAT SHE MOVED GRACEFULLY?

A. YEAH. SHE KEPT RHYTHM WITH THE MUSIC AND DID NOT APPEAR CLUMSY.

Q. WOULD YOU SAY THAT SHE KEPT A BEAT?

A. I WOULD SAY THAT, YES.

Q. NOW, WITH RESPECT TO YOUR AUDIO NOTES, IF SOMEBODY HAD DONE AN UNUSUAL THING, A VERY UNUSUAL THING IN THE COURSE OF THEIR DANCE, WOULD YOU HAVE MADE A RECORD OF THAT ON THE AUDIO TAPE?

A. I MIGHT HAVE, DEPENDING UPON WHAT THAT UNUSUAL THING WAS.

Q. WELL, FOR EXAMPLE, IF SOMEBODY WERE JUST [9] STANDING UP THERE ON THE STAGE DOING NOTHING BUT MASTURBATING, WOULD YOU HAVE RECORDED THAT ON THE TAPE?

A. I MOST CERTAINLY WOULD HAVE, YES.

Q. WITH RESPECT TO – WOULD YOU LOOK AT 15, PLEASE, EXHIBIT 15 IN YOUR BOOK, DETECTIVE SWANSON?

A. YES.

Q. THERE IS A BUNCH OF PAPERS IN THE FRONT, AND THEN FINALLY WE COME TO A REPORT FOR SOMEBODY BY THE NAME OF APRIL WHITE. DO YOU SEE THAT, SIR?

A. I HAVE IT, YES.

Q. WOULD YOU FLIP OVER TO THE OFFICER'S STATEMENT.

DO YOU RECALL ON NOVEMBER 20TH, 1995 IF APRIL WHITE WAS DOING A DANCE WHEN YOU MADE YOUR OBSERVATIONS CONCERNING THAT INDIVIDUAL?

A. YES, SHE WAS ON THE STAGE PERFORMING, YES.

Q. THE NEXT ONE, TAMMY BERGQUIST?

A. YES, SHE WAS AS WELL.

Q. SHE WAS DANCING?

A. YES.

Q. AND THE TOUCHING, THE TOUCHING THAT YOU OBSERVED WITH MISS BERGQUIST, WAS THAT A PART OF THE PERFORMANCE THAT YOU OBSERVED?

A. IT WAS.

Q. NEXT ONE, GIOVONNA GREENWOOD. IS SHE [10] ANOTHER INDIVIDUAL THAT YOU OBSERVED?

A. YES.

Q. AND WAS SHE DANCING?

A. SHE WAS.

Q. AND WAS THE TOUCHING PART OF HER PERFORMANCE?

A. YES, IT WAS.

Q. SARA LYONS?

A. YES.

Q. SHE WAS DANCING?

A. SHE WAS.

Q. AND THE TOUCHING WAS PART OF HER PERFORMANCE?

A. YES, IT WAS.

Q. WAS THERE ANY INDIVIDUAL IN THIS GROUP THAT WAS NOT DANCING?

A. NO.

Q. WAS THERE ANY INDIVIDUAL IN THIS GROUP THAT YOU OBSERVED WHO TOUCHED HERSELF AND THE TOUCHING WAS NOT PART OF THE PERFORMANCE?

A. I'M NOT SURE – NO. IT WAS – ALL THE ACTIONS THAT I DESCRIBED ON THE TAPE TOOK PLACE DURING THE INDIVIDUAL PERFORMANCE.

Q. TOOK PLACE WHILE THEY WERE DANCING?

A. YES.

[11] MR. LEVY: NO FURTHER QUESTIONS. THANK YOU, SIR.

* * *

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, AND JJR, INC.,	)	66551-6
PLAINTIFFS,	)	96-2-02226-8SEA
VS.	)	
CITY OF SEATTLE, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 15, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

* * *

[31] REDIRECT EXAMINATION +

BY MR. LEVY:

Q. CAPTAIN OLIVER, WHEN YOU RECEIVED THE INFORMATION FROM GENERAL INVESTIGATING UNIT OFFICERS CONCERNING OBSERVATIONS THAT THEY MADE IN THE NIGHTCLUBS BEFORE NOVEMBER OF 1995, FROM WHOM DID YOU RECEIVE THAT INFORMATION?

A. FROM ABOUT FOUR DIFFERENT INDIVIDUALS.

Q. AND WHEN YOU RECEIVED THAT INFORMATION, DID THEY GIVE IT TO YOU VERBALLY OR IN WRITING?

A. THEY GAVE IT TO ME VERBALLY.

Q. DID YOU SEE ANY DOCUMENTS BEFORE NOVEMBER OF [32] 1995, ANY DOCUMENTS WHICH HAD BEEN PRODUCED BY THE VICE SECTION OR – EXCUSE ME – THE GENERAL INVESTIGATING UNIT DOCUMENTING THE OCCURRENCE OF THE BEHAVIORS WHICH THEY DESCRIBED TO YOU?

A. NOT THAT I RECALL, NO.

Q. DID YOU VERIFY THAT YOURSELF, THAT THE BEHAVIORS WERE TAKING PLACE?

A. NO, I DID NOT.

Q. NOW, IF YOU WOULD LOOK AT ITEM NUMBER 5. PLEASE LOOK AT WHERE IT SAYS IN THE TOP PARAGRAPH: (READING)

> "GABRIELLE ON THE MAIN STAGE, BLACK SPARKLING STRING BIKINI. SHE TOUCHED HER ANUS, BUTTOCKS, MASSAGED HER BREAST."

IF AN OFFICER SAW GABRIELLE TOUCHING HER BUTTOCKS, IN YOUR ESTIMATION, SIR, WOULD THAT CONSTITUTE PROBABLE CAUSE TO PLACE HER UNDER ARREST?

A. ACCORDING TO THE ORDINANCE, IF I REMEMBER IT RIGHT, IT SAYS IF YOU TOUCH, MASSAGE OR FONDLE.

Q. SO THE ANSWER IS YES?

A. BY THE ORDINANCE, BUT HE WAS ALSO GIVEN INSTRUCTION BY ME WHAT I INTERPRETED TOUCHING TO BE.

Q. BUT ACCORDING TO THE ORDINANCE, ACCORDING TO YOUR UNDERSTANDING OF THE ORDINANCE, IF GABRIELLE TOUCHED HER BUTTOCKS, THAT WOULD BE PROBABLE CAUSE FOR AN ARREST?

[33] A. SHE COULD BE ARRESTED ON PROBABLE CAUSE, YES.

Q. AND IT WOULDN'T MATTER, AS FAR AS YOU WERE CONCERNED, WHETHER THIS TOUCHING TOOK PLACE IN THE COURSE OF A BALLET?

A. MY INSTRUCTIONS WERE DIFFERENT.

Q. IF GABRIELLE HAD MASSAGED HER BREAST IN THE COURSE OF A BALLET DANCE, IT WOULDN'T MAKE ANY DIFFERENCE TO YOU WHETHER SHE WAS DANCING A BALLET OR NOT, YOU WOULD STILL HAVE PROBABLE CAUSE FOR AN ARREST?

A. ACCORDING TO THE ORDINANCE UNDER ADULT ENTERTAINMENT, IF THEY'RE ON STAGE AND THEY ARE DOING IT AND THEY WERE MASSAGING THEIR BREAST, HE WOULD ARREST THEM.

Q. EVEN IF SHE WERE DOING A BALLET?

A. EVEN IF SHE WAS DOING A BALLET.

* * *

THE SUPREME COURT OF WASHINGTON

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC. Respondents, v. CITY OF SEATTLE, Petitioner.	NO. 68971-7 **ORDER RECALLING MANDATE** (Filed Jan. 7, 2002) King County No. 96-2-02226-8 SEA C/A No. 43409-8-I

A mandate was issued in this case on December 27, 2001, which in pertinent part stated: "This cause is mandate to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." However, the Court issued an Order Changing Opinion on December 5, 2001, which remanded the case to the Court of Appeals for further proceedings. Therefore, the mandate was issued in error.

Pursuant to RAP 12.9(b), the mandate issued on December 27, 2001, is recalled and the case is remanded to the Court of Appeals for further proceedings in accordance with the Order Changing Opinion issued by this Court.

DATED at Olympia, Washington this 7th day of January 2002.

/s/ C. J. Merritt
C. J. MERRITT
SUPREME COURT CLERK

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

RICHARD D. JOHNSON,
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Case No. 43409-8-I, ***Nick Furfaro et al., v. City of Seattle.***

RE: Request for briefing.

Dear Counsel:

We have reviewed the Supreme Court's order dated December 5, 2001, granting reconsideration and changing the Court's opinion. Based on a review of the briefing, records and files in this case, this court has determined

that it would be helpful to have further briefing from the parties.[1]

In its order, the Supreme Court remanded this case pursuant to RAP 13.7(b) "to consider the availability of injunctive or declaratory relief under the state constitution and issues left unresolved by this opinion." The Supreme Court stated in the order that "State constitutional claims for injunctive and declaratory relief arising under Washington Constitution article I, section 5, are remanded to the Court of Appeals, Division One, for further appropriate proceedings."

Accordingly, this court requests that the parties provide briefing on the claims identified above. The parties may additionally wish to address what further proceedings they feel are appropriate with respect to the issue of the availability of declaratory or injunctive relief under article I, section 5 of the Washington Constitution.

This court has Furfaro's opening brief, dated June 30, 1998, the City's response, dated August 31, 1998, Furfaro's reply, dated September 25, 1998, all of which were originally filed in the Supreme Court and later transferred to this court as the basis for the appeal decided by this court. We have Furfaro's supplemental brief filed with the Supreme Court on July 3, 2000 and the City's supplemental brief filed with this court on the same date. We also have the City's subsequent petition for review in the Supreme Court, and Furfaro's response thereto as

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[1] RAP 10.1(h) provides that an appellate court may direct the filing of briefs on the merits other than those specified in the Rules of Appellate Procedure.

well as Furfaro's motion for reconsideration of the Supreme Court's opinion and the City's opposition thereto.

This material is sufficient to represent Furfaro's opening position on the merits of the issues remanded. Therefore, we request that the City of Seattle file a responsive brief within 30 days of receipt of this letter with a copy served upon counsel of record in this case. Upon receipt of the City's responsive brief, Furfaro et al. will have 30 days to file a reply brief. Each brief should be no longer than 25 pages.

Sincerely,

/s/ Richard D. Johnson
Richard D. Johnson
Court Administrator/Clerk

CoA

Supreme Court, U.S.
FILED
MAY 10 2002
CLERK

No. 01-1316

IN THE SUPREME COURT
OF THE UNITED STATES

CITY OF SEATTLE,

Petitioner,

v.

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Washington

PETITIONER'S REPLY BRIEF

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13

Table of Contents

Page

REASONS FOR GRANTING THE WRIT 1

A. The Washington Supreme Court wrongly extended significant new First Amendment protections to non-expressive conduct in contravention of this Court's prior decisions 1

1. This Court does not consider all acts by nude entertainers to be expression 1

2. The underlying decision was based on First Amendment grounds 2

a. *O'Day* includes analysis on federal grounds 3

b. The Washington Supreme Court did not "merely apply" state law to resolve this case 4

B. This Court should set the proper level of First Amendment protection for these arrests 7

C. This Court has jurisdiction to consider the case 7

CONCLUSION 10

Table of Authorities

Page

Cases

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) 1

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 1, 3, 5, 6

Cox Broadcasting Corp v. Cohn, 420 U.S. 469 (1975) 7, 8, 9, 10

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 1

Everett v. Heim, 71 Wn.App. 392 (1993), *rev. denied* 123 Wn.2d 1018 (1994) 4

Kitsap County v. Kev, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986) 5

Miami Herald Publishing Co. v. Tornillo, 418 U.S.241 (1974) 9

O'Day v. King County, 109 Wn.2d 796 (1988) 2, 3, 4, 5, 6

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 1

Texas v. Johnson, 491 U.S. 397 (1989) 1

Statutes

28 U.S.C. § 1257 8

42 U.S.C. § 1983 ..... 6, 7, 9

Other Authorities

Article I, § 5 of the Washington Constitution 3

First Amendment to the Washington Constitution 1, 2, 3, 4, 5, 7, 8, 9, 10

REASONS FOR GRANTING THE WRIT

A. The Washington Supreme Court wrongly extended significant new First Amendment protections to non-expressive conduct in contravention of this Court's prior decisions.

1. This Court does not consider all acts by nude entertainers to be expression.

The Washington Supreme Court has incorrectly interpreted *City of Erie v. Pap's A.M.*[1] Petition at p. 12; Pet. App. 17-18. Based upon *Pap's A.M.*, the Washington Supreme Court imposed a requirement of obscenity upon *every* probable cause determination for arrests under Seattle's adult entertainment ordinance. The City maintains that the extension of these new First Amendment protections is contrary to prior decisions of this Court, including *Pap's A.M.* itself.

Respondents[2] mention the case only once, noting that the Washington court relied upon *Pap's A.M.* in holding nude dancing to be expressive conduct. Opposition at 12. Furfaro makes absolutely no mention of the additional cases set forth by the City as being in conflict with the analysis utilized by and new protections issued by the Washington Supreme Court in this case: *Texas v. Johnson, Doran v. Salem Inn, Inc., Barnes v. Glen Theatre, Inc.,* and *Paris Adult Theatre I v. Slaton.* See, Petition at pp. 14-21. Furfaro cites no case from this Court supporting the *degree of protection* extended by the underlying court.

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[1] 529 U.S. 277 (2000).

[2] Hereinafter, collectively "Furfaro."

There was no evidence at trial that Silva or Kidder intended to convey an expressive message *when committing the acts observed by Detective Swanson.* Neither plaintiff admitted to the accused acts, nor did either testify that the accused acts were expressive. Instead, they denied committing the accused acts, and testified that their dances were substantially similar to a "clean" videotaped dance that was shown to the jury.

The jury found that the officers had probable cause to make conduct arrests, for the very prohibited acts that were disavowed by Kidder and Silva. Any testimony of intent to express ideas during non-proscribed conduct is irrelevant. Given the absence of testimony regarding intent to accomplish expression during the forbidden sex acts, the error of the underlying court's decision is magnified.

2. <u>The underlying decision was based on First Amendment grounds.</u>

Rather than providing any prior decision of this Court to support the new First Amendment protections, Furfaro now contends that "the Washington Supreme Court merely applied this Court's general probable cause test to the Seattle ordinance as judicially construed in *O'Day.*"[3] Opposition at 11. In other words, Furfaro attempts to characterize the underlying decision as resting upon state law, in an attempt to avoid this Court's review.

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[3] *O'Day v. King County,* 109 Wn.2d 796 (1988).

First, Furfaro's portrayal of *O'Day* as a case limited to state law is inaccurate. Second, the Washington Supreme Court in this case went well beyond *O'Day*, specifically basing its rulings upon *Pap's A.M.* The underlying case was not resolved on state law grounds, and this Court should address the propriety of the new First Amendment protections wrongly extended by the Washington Supreme Court.

a. *O'Day* includes analysis on federal grounds.

Furfaro contends that the "decision in *O'Day* was expressly based upon Article I, § 5, the free expression clause of the Washington Constitution, rather than the First Amendment." Opposition at 9. In reality, the *O'Day* opinion includes analysis based upon the federal constitution as well. Regarding the overbreadth challenge to King County's ordinance, the *O'Day* court cited *both* federal and state cases before concluding that "Because the Washington Constitution is less tolerant than the First Amendment of overly broad restrictions on speech, we must apply the standard of article 1, section 5 in considering whether KCC 6.08 is overbroad." *O'Day*, 109 Wn.2d at 804. The court decided to "construe the ordinance to restrict only conduct and unprotected obscene expression." *Id.* at 806.

The *O'Day* court utilized both state and federal law to evaluate the stage requirement as well: "Before we consider whether the stage requirement is a valid time, place, and manner restriction, we must determine whether it regulates protected expression or whether it regulates only conduct. Pure conduct does not enjoy

the protections of either article 1, section 5 *or the First Amendment.*" *Id.* at 809 (citation omitted, emphasis added). Ultimately, the court found the stage requirement to regulate only conduct, not expression:

> We hold that it regulates only conduct, which is not protected under article 1, section 5 *or the First Amendment*.

Id. at 810 (emphasis added).

O'Day certainly does not establish obscenity as an element of the crime, pursuant to either state or federal law, for every arrest under King County's ordinance. Washington courts have already rejected such an argument, in *Everett v. Heim*, 71 Wn.App. 392 (1993), *rev. denied* 123 Wn.2d 1018 (1994)[4]. The Heim court, relying on *O'Day*, rejected an adult entertainer's contention that the trial court erred in failing to include obscenity as an element of the crime under an ordinance similar to *O'Day*. 71 Wn.App. at 395-396. As a result, her criminal conviction was upheld.

b. The Washington Supreme Court did not "merely apply" state law to resolve this case.

The Washington Supreme Court in this case noted that its own statements supporting First Amendment protection for nude dancing, including statements in *O'Day*, "have been carefully qualified."[5]

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[4] Cited by the Washington Supreme Court below at Pet. App. 17.

[5] Pet. App. 8. The court went on: "In *O'Day v. King County*, 109 Wn.2d 196, 803, 749 P.2d 142 (1988), this

The court then explicitly deferred to more recent decisions from this Court - *Barnes* and *Pap's A.M.* - as being more authoritative holdings regarding "the amount of protection given to nude dancing by the First and Fourteenth Amendments to the United States Constitution." Pet. App. 9.

Assessing the required elements of probable cause for a lawful arrest under Seattle's ordinance, the court again mentioned its prior decision in *O'Day*. Pet. App. 17. First, the court recognized the City's argument that its police officers could have probable cause to make arrests for conduct, as opposed to expression. Second, the court acknowledged that "the *O'Day* court agreed with the trial court that the performances engaged in by the defendants, evidently table dances or lap dances, constituted pure conduct unprotected by free expression guarantees." *Id.* Had the *O'Day* opinion been applied without regard to the subsequent decision from this Court in *Pap's A.M.*, it is obvious that the Seattle police officers would have been permitted to make arrests for such conduct, without any requirement to consider obscenity as part of the probable cause determination. After all, according to *O'Day*, the performances by Kidder and Silva could be considered conduct, unprotected by the First Amendment.

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court said, citing *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 140, 720 P.2d 818 (1986), that 'although the First Amendment protects the communication and expression of a nude dancer, public nudity itself is conduct subject to regulation.'" *Id.* at 8-9. Thus, under *O'Day* as interpreted by the court below, all conduct by an adult entertainer is not presumed expressive.

Of course, the Washington Supreme Court went on to interpret this Court's holding in *Pap's A.M.* Pet. App. 17-18. The Washington Supreme Court relied upon *Pap's A.M.*, not *O'Day*, in deciding that all acts of nude dancers are to be automatically afforded the full protection due expressive conduct: in this case, a requirement of obscenity as part of the probable cause evaluation to support a lawful arrest.

Furfaro posits that "the Washington Supreme Court drew a fact-based distinction." Opposition at 13. Of course, any such distinction rests entirely upon the court's conclusion that the *Pap's A.M.* decision from this Court settles the degree of protection to be afforded nude dancing (and all acts arguably committed during a dance). The court relied upon an erroneous interpretation of this Court's prior decisions.

Furfaro's attempt to characterize the court's decision below as a state law issue is surprising, given Furfaro's motion for reconsideration. The Washington Supreme Court initially remanded for trial only claims under 42 U.S.C. § 1983, potentially foreclosing Furfaro from arguing its state constitutional claims for injunctive relief. Of course, the Washington Supreme Court also acknowledged that state law violations do not give rise to § 1983 claims. While Furfaro successfully obtained reinstatement of their state claims, the procedural history clearly demonstrates that the Washington Supreme Court arrived at its decisions based upon federal rather than state grounds.

B. This Court should set the proper level of First Amendment protection for these arrests.

Furfaro does not contest the fact that the level of protection afforded to adult entertainers at arrest under the Fourth Amendment presents important constitutional issues. Given that presumptive free speech protections have been reserved for pure speech, it is important for this Court to clarify that conduct arrests for adult entertainers need not automatically include a determination of obscenity.

C. This Court has jurisdiction to consider the case.

The Washington Supreme Court's ruling below sets the First Amendment standard which will govern the Fourth Amendment analysis at trial. In order for the plaintiffs to prevail on their claims under 42 U.S.C. § 1983, they must prove that there was no probable cause for their arrests. Under the present standard, the arresting officers needed to have probable cause to believe that the acts they witnessed were obscene, in order to make a lawful arrest. Absent review by this Court, all further proceedings will be governed by this new and incorrect First Amendment standard.

The case is presently remanded for a new trial. However, *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (1975), notes that:

> the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in

> which there are further proceedings in the lower courts to come. There are now *at least* four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts.

420 U.S. at 477 (emphasis added).

Under *Cox*, this Court should treat the decision of the Washington Supreme Court on the federal issue as a final judgment. This is a situation "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action..." 420 U.S. at 482-483. The City maintains that the federal issue would completely obviate the need for further proceedings. Without the new First Amendment protections created by the underlying court, the jury's verdict and the trial court's disposition of all claims would stand undisturbed, and police officers could continue to make lawful arrests where they had probable cause to believe that adult entertainers had committed criminal conduct.

On the other hand, if the case is allowed to proceed to trial, it is possible that a jury will find that

the arresting officers did, in fact, have probable cause to believe that the acts they witnessed were obscene. If the City prevails on the § 1983 claims, it will have no opportunity to subsequently challenge the underlying ruling by the Washington Supreme Court. The City ought not be potentially foreclosed from obtaining this Court's corrective attention regarding the Washington Supreme Court's newly formulated First Amendment protections, which are currently afforded as a matter of law in all arrests under Seattle's adult entertainment ordinance.

As noted by *Cox*, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue..." 420 U.S. at 483. There is no dispute that the arrest criteria for officers enforcing adult entertainment ordinances, while suspects seek refuge within the First Amendment, presents important federal questions. As this Court noted in *Cox*, when discussing the most recent case in this very category:

> Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press.

Cox, 420 U.S. at 484-485 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S.241 (1974) (additional citations omitted). It would be similarly intolerable to leave

municipalities, police officers, and women claiming to perform expressive sex acts with the present, unsettled posture of Seattle's adult entertainment ordinance.

Furfaro concedes that its contingent cross-petition satisfies this same exception from *Cox*. Cross-Petition at 27. The City's petition satisfies the exception as well.[6] For all of the above reasons, the Court should exercise its jurisdiction under *Cox* and grant the petition for the writ of certiorari.

CONCLUSION

Absent review by this Court, police officers in Washington will effectively be prohibited from arresting adult entertainers for simple criminal conduct. Instead, adult entertainers will be free to commit any conceivable act, secure in the knowledge that their actions are presumptively afforded the status of expression protected by the First Amendment. There are important Constitutional considerations at stake, regarding the degree of First Amendment protection extended to nude adult entertainers upon arrest, and officers' determinations of probable cause that a crime has been committed in their presence. The City respectfully requests that this Court grant its petition for a writ of certiorari.

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[6] Furfaro attempts to argue that its issues satisfy *Cox*, while the City's appeal somehow fails the same test. Cross-Petition at 27. However, Furfaro admits that "Each of these three issues is inextricably intertwined with the others." *Id.* at 10. Thus, Furfaro cannot reasonably contest jurisdiction under *Cox*.